Dec 509

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 720.

ERNEST B. DANE, PLAINTIFF IN ERROR,

vs.

JAMES JACKSON, TREASURER AND RECEIVER-GENERAL.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 5, 1921.

(28,077)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1921.

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August, A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this second day of February in the year one thousand nine hundred and twenty-one.

[SEAL.] ARTHUR P. RUGG.

b UNITED STATES OF AMERICA, *ss:*

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Ernest B. Dane, Plaintiff, and James Jackson, Treasurer and Receiver-General, Defendant, in a petition for writ of mandamus, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said Ernest B. Dane, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES S. ALLEN,
Clerk of the District Court of the United States,
District of Massachusetts.

Jan. 28, 1921.

Allowed by
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial
Court of Massachusetts.

c [Endorsed:] Writ of error to State court.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this second day of February, A. D. 1921.

JOHN F. CRONIN,
Clerk.

d COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Law from the first day of January in the year of our Lord one

thousand nine hundred and twenty to the first day of February nineteen hundred and twenty-one, both days inclusive, it is thus contained: the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court.

Common Law.

ERNEST B. DANE

v.

TREASURER & RECEIVER-GENERAL.

Report.

This case came on to be heard before me upon petition and demurrer, and after argument by counsel I ordered the demurrer sustained. Being of opinion that the questions of law raised by the demurrer ought to be determined by the Full Court before further proceedings are had in this Court, I report the case to the Full Court, such entry to be made as it may determine.

EDWARD P. PIERCE,
J. S. J. C.

November 5, 1920.

Petition for Writ of Mandamus.

Respectfully represents your petitioner:

(1) That he is a taxable inhabitant of the Town of Brookline in the County of Norfolk and Commonwealth of Massachusetts, and that he is the owner of certain real estate situated in said Brookline and taxable therein.

(2) That section 2 of chapter 269 of the General Acts of 1916 as amended by chapters 7 and 120 of the General Acts of 1918 provides as follows:

"Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

"(*a*) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

"First. Deposits in any savings bank chartered by this commonwealth or in the Massachusetts Hospital Life Insurance Company, or such of the deposits in the savings department of any trust company so chartered as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six

of chapter five hundred and ninety of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto, and deposits in any bank situated in the state of New Hampshire, so long as the provisions of chapter one hundred and eighty-nine of the Public Acts of nineteen hundred and seventeen of that state remain in force, and deposits in any bank in any other state which exempts from taxation to its inhabitants similar deposits, and interest and dividends thereon, owned by such inhabitants in banks in this commonwealth.

"Second. Bonds of the United States and such bonds, notes and certificates of indebtedness of the commonwealth and of political subdivisions thereof as are exempt from taxation under the provisions of clause fifteen of section five of Part I of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto.

"Third. Loans secured exclusively by mortgages of real estate taxable as real estate, situated within the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate.

"(*b*) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except national banks and except such foreign corporations as are subject to a tax upon their franchises payable to this commonwealth under the provisions of sections forty-three and fifty-two of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto.

"(*c*) Dividends on shares in partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, except dividends on shares of the following:

"First. Partnerships, associations or trusts, which file with the tax commissioner the agreement hereinafter provided for, and the property of which consists exclusively of one or more of the following specified kinds of property, to wit:—real estate wherever situated and supplies therefor and receipts therefrom; stocks of corporations taxable under the provisions of sections forty-three and fifty-two of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto; bonds, notes, loans secured by mortgage of real estate, and certificates of indebtedness, the income of which is exempt from taxation under the provisions of this section; property the income of which, if any, would be taxable under this section if owned by an inhabitant of the commonwealth; shares in partnerships, associations or trusts, dividends on which are exempt from taxation under this section.

"Second. Partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, which file such agreement and furnish satisfactory proof to the tax commissioner that

two thirds, at least, of their taxable property is taxed within the commonwealth and that the remainder, if taxable, is taxed where it is situated.

"Partnerships, associations or trusts, the dividends on shares of which are exempt from taxation under this section, shall pay to the tax commissioner annually a tax of six per cent of the income derived from any property owned by such partnerships, associations or trusts, so far as such income would be taxable under this section if received by an inhabitant of the commonwealth."

(3) That prior to the enactment of said section the property thus made taxable in respect to its income was taxed for state, county, and municipal purposes in the city or town in which the owner lived at its capital value in the same manner as other personal property, and property of this character constituted approximately one half of the property subject to taxation by said Town of Brookline; and that by section 11 of said chapter 269 of the General Acts of 1916 the property which was taxed with respect to its income by section 2 of said Act was exempted from all other taxation.

(4) That the petitioner is the owner of certain personal property the income of which is subject to taxation under said section; that the securities constituting or representing such property are and have been kept by him in said Brookline; and that such securities are not based upon and do not derive their value from property situated or business carried on in any other city or town in this Commonwealth and are not used in connection with any business carried on in any city or town whatsoever other than said Brookline.

(5) That section 5, subsection (*b*), of said chapter 269 of the General Acts of 1916 provides as follows:

"The excess over two thousand dollars of the income, as defined in section six, derived from professions, employments, trade or business shall be taxed at the rate of one and one half per cent per annum. In determining such income the rental value of living quarters furnished any individual as part of his compensation shall be included. The wages and salaries of employees and officers of the United States government shall not be taxed; but if such employees and officers receive other income taxable under this section, that part of such other income shall be taxed which, when such other income is added to the amount of the wages or salary received as an employee or officer of the United States government, shall be in excess of two thousand dollars."

(6) That the petitioner is in receipt of an income from professions, employments, trade, or business subject to taxation under said subsection; and that said professions, employments, trade, or business are carried on in said Brookline and in no other city or town in this commonwealth or elsewhere.

(7) That the petitioner has filed a return of his income as aforesaid for the year 1919 with the Commissioner of Corporations and

Taxation of the Commonwealth of Massachusetts, as required by law, and that said commissioner has assessed a tax on said property and on said income from said professions, employments, trade, or business for the year 1919 and upon large amounts of similar property situated in said Brookline and owned by other inhabitants of said town, and upon the incomes of professions, employments, trade, or business earned by inhabitants of said town, in accordance with said chapter 269 of the General Acts of 1916, and is about to turn over the money so raised to the respondent herein, in accordance with the provisions of section 17 of said Act.

(8) That the petitioner is informed and believes and consequently avers that of the amount raised by taxation during the year 1920 under said sections 2 and 5 (*b*) of chapter 269 of the General Acts of 1916, amended as aforesaid, a sum in excess of one million dollars has been raised by the taxation of inhabitants of said Brookline upon property located in said Brookline and upon incomes earned in said Brookline.

(9) That the petitioner has derived income during the year 1920 in the same manner and from the same sources as set forth in paragraphs (4) and (6) of this petition, and that the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is intending to and will during the year 1921 assess a tax on said property and on said income for the year 1920 and upon large amounts of similar property situated in said Brookline and owned by other inhabitants of said town, and upon the incomes of professions, employments, trade, or business earned by inhabitants of said town, in accordance with said chapter 269 of the General Acts of 1916, and is intending to and will turn over the money so raised to the respondent herein, in accordance with the provisions of section 17 of said Act.

(10) That the petitioner is informed and believes and consequently avers that of the amount which will be raised by taxation during the year 1921 under said sections 2 and 5 (*b*) of chapter 269 of the General Acts of 1916, amended as aforesaid, a sum in excess of one million dollars will be raised by the taxation of inhabitants of said Brookline upon property located in said Brookline and upon incomes earned in said Brookline.

(11) That the entire amount appropriated by the General Court for the necessary defense and support of the government of the Commonwealth and the protection and preservation of the subjects thereof is raised each year by duties and excises and by direct taxation of real estate and tangible personal property, and that no part of the amount raised by taxation under chapter 269 of the General Acts of 1916 is or ever has been expended by the Commonwealth except the actual cost of assessing and collecting the tax; and that except as aforesaid the taxes assessed under said chapter are levied wholly for the use of the cities and towns of the Commonwealth. That the amount raised by said tax on incomes is not paid into the general fund of the Commonwealth, but is kept separate and is designated

an "Agency Account." That during the years 1917 and 1918 the amount raised by said tax upon incomes was distributed and paid over to the cities and towns of the state in such a manner as to reimburse each city or town for the amount of taxes which it had previously collected from the classes of property now made subject to the tax upon incomes, but no permanent method of distributing the proceeds of said tax on incomes was adopted.

(12) That sections 1 and 2 of chapter 314 of the General Acts of 1919 provide as follows:

"Section 1. The taxes collected by the commonwealth upon incomes under the provisions of chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen, and acts in amendment thereof, shall, on or before the fifteenth day of November in each year, be distributed among and paid to the several cities, towns and districts by the treasurer and receiver general in the manner following, namely:—to each city, town and district such proportion of an amount equal to the difference between the average amount of the tax levied upon personal property in such city, town or district in the years nineteen hundred and fifteen and nineteen hundred and sixteen, and the average amount, computed by the tax commissioner, that would be produced by a tax upon the personal property actually assessed in each city, town or district for the years nineteen hundred and seventeen and nineteen hundred and eighteen at an average of the same rates of taxation as prevailed therein in the years nineteen hundred and fifteen and nineteen hundred and sixteen as is ninety per cent thereof for the year nineteen hundred and nineteen, as is eighty per cent thereof for the year nineteen hundred and twenty, as is seventy per cent thereof for the year nineteen hundred and twenty-one, as is sixty per cent thereof for the year ninteen hundred and twenty two, as is fifty per cent thereof for the year nineteen hundred and twenty-three, as is forty per cent thereof for the year nineteen hundred and twenty-four, as is thirty per cent thereof for the year nineteen hundred and twenty-five, as is twenty per cent thereof for the year nineteen hundred and twenty-six, as is ten per cent thereof for the year nineteen hundred and twenty-seven; and in the year nineteen hundred and twenty-eight and thereafter all the taxes so collected shall be distributed and paid to the several cities and towns in proportion to the amount of the state tax imposed upon each of them in each year.

"Section 2. The amount so collected in any year in excess of the sum necessary to make the said payments shall be distributed in proportion to the amount of the state tax imposed upon each city and town in that year; provided, that of the amount so collected the commonwealth shall first retain a sum sufficient to reimburse it for the expenses incurred in the collection and distribution of said tax and for abated taxes repaid under said act during each year."

(13) That the state tax is imposed upon the several cities and towns in the Commonwealth in proportion to the value of the real

estate, tangible personal property, and polls taxable therein, with polls reckoned at one tenth of a mill for each thousand dollars of the state tax; and intangible property and incomes from professions, employments, trade, or business, taxable under said chapter 269 of the General Acts of 1916, are not regarded in determining
7 the proportion of each city and town of the state tax; and that, because of the fact that Brookline is a residential town and the aggregate value of the real estate and tangible personal property taxable therein bears a much smaller proportion to the aggregate of such property in the state than the income tax assessed upon inhabitants of Brookline bears to the entire income tax, under the provisions of said chapter 314 of the General Acts of 1919, of the proceeds of the tax assessed under said sections 2 and 5 (*b*) of chapter 269 of the General Acts of 1916 in the year 1920 not more than $500,000 will be distributed and paid to the Town of Brookline, and in each year thereafter the amount so distributed and paid will be less, until the year 1928 and thereafter, when not more than $250,000 will be distributed and paid to said town out of the sum in excess of one million dollars raised from the taxation of intangible property and incomes located therein.

(14) That article LXIII of the Amendments to the Constitution of Massachusetts provides as follows:

"Section 1. Collection of Revenue.—All money received on account of this commonwealth from any source whatsoever shall be paid into the treasury thereof.

"Section 2. The Budget.—Within three weeks after the convening of the general court the governor shall recommend to the general court a budget which shall contain a statement of all proposed expenditures of the commonwealth for the fiscal year, including those already authorized by law, and of all taxes, revenues, loans and other means by which such expenditures shall be defrayed. This shall be arranged in such form as the general court may by law prescribe, or, in default thereof, as the governor shall determine. For the purpose of preparing his budget, the governor shall have power to require any board, commission, officer or department to furnish him with any information which he may deem necessary.

"Section 3. The General Appropriation Bill.—All appropriations based upon the budget to be paid from taxes or revenues shall be incorporated in a single bill which shall be called the general appropriation bill. The general court may increase, decrease, add or omit items in the budget. The general court may provide for its salaries, mileage, and expenses and for necessary expenditures in anticipation of appropriations, but before final action on the general appropriation bill it shall not enact any other appro-
8 priation bill except on recommendation of the governor. The governor may at any time recommend to the general court supplementary budgets which shall be subject to the same procedure as the original budget.

"Section 4. Special Appropriation Bills.—After final action on the general appropriation bill or on recommendation of the governor, special appropriation bills may be enacted. Such bills shall provide the specific means for defraying the appropriations therein contained."

That the distribution of the proceeds of the income tax as authorized by said chapter 314 of the General Acts of 1919 was not contained in the original budget or in any supplementary budget submitted by the Governor in the year 1920, nor was it included in any general or special appropriation bill enacted by the General Court during said year.

(15) That the respondent, acting under supposed authority of said chapter 314 of the General Acts of 1919, is about to, and will unless restrained by this Honorable Court, turn over to divers cities and towns in this Commonwealth other than said Brookline more than half of the money so raised or to be raised by the taxation of personal property belonging to the petitioner and to other inhabitants of said Brookline and situated in said Brookline, and by the taxation of incomes from professions, employments, trade, or business earned by the petitioner and other inhabitants of said Brookline, to be used by said cities and towns, if they so elect, exclusively for their own private and proprietary purposes and for the use and benefit of their own inhabitants, and in no degree for the use and benefit of the inhabitants of the Commonwealth or for the necessary defense and support of the government thereof and the protection and preservation of the subjects thereof, or for the use and benefit of the petitioner or of his property or for the use and benefit of the other inhabitants of Brookline or of their property, and for purposes in the selection of which neither the petitioner nor any other inhabitant of Brookline, paying the taxes as aforesaid, will have any voice, either directly or through his representatives.

(16) That there are in the Commonwealth of Massachusetts a number of cities and towns containing large manufacturing establishments and important commercial districts, in which land is very valuable and where large and valuable buildings have been erected; and that the taxes on the real estate and tangible personal property in such cities and towns furnish ample revenue for such cities and towns; that there are in the Commonwealth other
9 cities and towns containing few manufacturing establishments and no important commercial districts, and such towns are obliged to depend for their revenues upon the taxable intangible property and incomes of their inhabitants, and that the Town of Brookline falls within the latter class. That as a result of these conditions the towns in the former class will receive from the proceeds of the income tax much more than their inhabitants contribute thereto or than is derived from property situated or business carried on within their limits, and the towns in the latter class will receive much less, as is shown in a table hereto annexed.

(17) That, as a result of the diversion of the taxes paid by the petitioner and the inhabitants of said Brookline to other cities and towns, a great and disproportionate burden is placed upon the petitioner's real estate and the real estate situated in said Brookline.

(18) That said chapter 314 of the General Acts of 1919 is unconstitutional and void for the following reasons:

(*a*) It provides for the levy of a tax which is not for the use of the district taxed and thus deprives the persons so taxed of their property without due process of law, in violation of article XIV of the Amendments to the Constitution of the United States.

(*b*) It authorizes the expenditure of money, raised by taxation throughout the state at large, for private and proprietary purposes of particular municipalities, and thus imposes an obligation to pay taxes upon individuals which is not founded on their participation in the benefits arising from the expenditure of money so raised, in violation of article X of the Declaration of Rights in the Constitution of Massachusetts, and of article XIV of the Amendments to the Constitution of the United States.

(*c*) It authorizes the expenditure of money raised by taxation for purposes in the choice of which those who pay the taxes have no voice, in violation of articles X and XXIII of the Declaration of Rights in the Constitution of Massachusetts and of article XIV of the Amendments to the Constitution of the United States.

(*d*) It gives to certain cities and towns and to the inhabitants thereof certain advantages and particular and exclusive privileges distinct from those of the community in that the distribution of the proceeds of the tax on intangible personal property and the incomes from professions, employments, trade, or business is based upon the wealth of such cities and towns in real estate and tangible personal property, and not upon their necessities or upon the consideration of services rendered to the public, in violation of article VI of the Declaration of Rights in the Constitution of Massachusetts and of article XIV of the Amendments to the Constitution of the United States.

(*e*) It provides for the expenditure of money out of the treasury of the Commonwealth without appropriation for any particular public purpose, in violation of part II, chapter 1, section 1, article IV, of the Constitution of Massachusetts.

(*f*) It provides for the levy of taxes for purposes other than the necessary defense and support of the government of the Commonwealth and the protection and preservation of the subjects thereof, in violation of part II, chapter 1, section 1, article IV, of the Constitution of Massachusetts.

(*g*) It provides for the issuance of moneys out of the treasury of the Commonwealth for purposes other than the necessary defense and support of the Commonwealth and the protection and preserva-

tion of the inhabitants thereof, in violation of part II, chapter 2, section 1, article XI, of the Constitution of Massachusetts.

(*h*) In providing for the distribution of money raised by taxation upon one class of property to cities and towns in proportion to their wealth in other classes of property, it is not a wholesome or reasonable law; and it results in the imposition and levy of disproportionate and unreasonable assessments, rates, and taxes upon the petitioner, and is thus in excess of the power granted to the legislature by part II, chapter 1, section 1, article IV, of the Constitution of Massachusetts.

(*i*) In providing for the reimbursement out of the proceeds of the income tax of the entire amount paid by each city or town toward the state tax, it in effect throws the entire burden of taxation for state purposes on intangible personal property and incomes from professions, employments, trade, and business and exempts real estate and tangible personal property, the income of which is not taxed, from any taxation whatever for state purposes, in violation of part II, chapter 1, section 1, article IV, of the Constitution of Massachusetts and of article XLIV of the Amendments thereto.

(*j*) It diminishes the taxing power of the Town of Brookline by taking away a large portion of its taxable property, and thus impairs the obligation of contracts previously entered into by divers other parties with said town on the faith of its power to tax the intangible personal property of its inhabitants, in violation of article I, section 10, of the Constitution of the United States.

11 (*k*) It authorizes the levy of a tax for a private use, namely, to exempt certain arbitrarily selected taxpayers from paying their fair share of the public burdens, in violation of article XIV of the Amendments of the Constitution of the United States.

(*l*) It denies to persons within the jurisdiction of the Commonwealth of Massachusetts the equal protection of the laws, in violation of article XIV of the Amendments to the Constitution of the United States.

(19) That said chapter 314 of the General Acts of 1919 was approved by the Governor on July 15, 1919, but, under the provisions of that part of article XLVIII of the Amendments to the Constitution of Massachusetts relating to the referendum, it did not take effect until ninety days thereafter, namely, October 13, 1919; that thereafter, to wit, on October 16, 1919, the petitioner herein filed a petition for writ of mandamus in the Supreme Judicial Court of Massachusetts against Charles L. Burrill, who was then Treasurer and Receiver-General of the Commonwealth of Massachusetts, substantially the same as the present petition, and that said petition was duly heard by the Full Bench of said Court, and after hearing judgment was entered on December 30, 1919, by which said petition was dismissed; that the petitioner herein on January 15, 1920, took out a writ of error in the Supreme Court of the United States in said proceedings against Charles L. Burrill and caused said writ to be

entered in said Court and said case is still pending therein, being numbered 764 of the October term of 1919; but before any hearing could be had in said Court the term of said Charles L. Burrill expired, and Fred J. Burrell succeeded him in the office of Treasurer and Receiver-General; that thereafter, on May 20, 1920, the petitioner herein filed a petition for mandamus in the Supreme Judicial Court of Massachusetts against said Fred J. Burrell, substantially the same as the present petition, and that thereafter on August 3, 1920, judgment was entered by which said petition was dismissed; that the petitioner herein on August 17, 1920, took out a writ of error in the Supreme Court of the United States in said proceeding against Fred J. Burrell and caused said writ to be entered in said Court, and said case is still pending therein, being numbered 509 of the October term of 1920; but before any hearing could be had in said Court, namely, on September 4, 1920, said Fred J. Burrell resigned his said office, and on September 8, 1920, James Jackson, the respondent herein, was appointed in his place.

(20) Wherefore your petitioner prays that this Honorable Court will issue its writ of mandamus in favor of your petitioner, directed to the respondent, commanding him not to distribute or pay
12 over any portion of the tax for the year 1920 or the year 1921 raised under the provisions of chapter 269 of the General Acts of 1916 from the petitioner or from any other inhabitant of the Town of Brookline to any other city or town until the further order of the Court.

By His Attorneys, PHILIP NICHOLS.
RALPH A. STEWART.

On the 14th day of October, 1920, before me personally appeared the above-named Ernest B. Dane and made oath that the matters alleged therein are true, except as to matters therein stated to be on information and belief, and that as to these matters he believes them to be true.

PHILIP NICHOLS,
Notary Public.

My commission expires March 6, 1925.

Filed October 14, 1920.

Table Showing Amounts Paid by Inhabitants of Certain Cities and Towns in Income Taxes in 1918 and the Amount that the Same Cities and Towns Would Receive if the Income Tax were Distributed in Proportion to the State Tax.

	Amts. pd.	Amts. recd.	Amts. pd. in excess of amts. recd.	Amts. recd. in excess of amts. pd.
Amesbury	$13,445.39	$24,073.00	.....	$10,627.61
Andover	118,991.66	24,605.00	$94,386.66	.....
Arlington	82,637.46	44,550.00	38,087.46	.....
Attleborough	43,269.06	56,392.00	.....	13,122.94
Barnstable	37,591.32	22,078.00	15,513.32	.....
Belmont	72,512.85	34,979.00	37,533.85	.....
Beverly	220,305.78	95,627.00	124,678.78	.....
Bourne	33,432.92	15,029.00	18,403.92	.....
Brockton	106,178.77	180,215.00	.....	74,036.23
Brookline	1,324,885.63	237,538.00	1,087,347.63	.....
Chelsea	26,035.42	106,400.00	.....	80,364.58
Chicopee	14,605.68	96,824.00	.....	82,218.32
Cohasset	73,922.99	15,827.00	58,095.99	.....
Concord	62,046.19	20,033.00	42,013.19	.....
13 Dalton	49,149.46	11,704.00	37,445.46	.....
Dedham	97,501.72	37,240.00	60,261.72	.....
Dover	65,557.88	7,315.00	58,242.88	.....
Easthampton	7,548.60	30,590.00	.....	23,041.40
Easton	139,066.94	11,837.00	127,229.94	.....
Everett	16,685.82	110,523.00	.....	93,837.18
Fall River	129,530.14	356,972.00	.....	236,441.86
Falmouth	90,626.95	18,221.00	72,405.95	.....

Amounts Paid by Inhabitants of Certain Cities and Towns in Income Taxes in 1918.—Continued.

	Amts. pd.	Amts. recd.	Amts. pd. in excess of amts. recd.	Amts. recd. in excess of amts. pd.
Fitchburg	79,882.56	126,616.00	.....	46,733.44
Framingham	49,467.99	60,648.00	.....	11,180.01
Hamilton	79,236.97	10,108.00	69,128.97	.....
Haverhill	108,235.35	142,310.00	.....	34,074.65
Hingham	46,612.27	18,620.00	27,992.27	.....
Holyoke	107,889.51	204,953.00	.....	97,063.49
Hopedale	68,687.33	14,630.00	54,057.33	.....
Hull	3,114.84	26,999.00	.....	23,884.16
Lawrence	56,269.97	256,956.00	.....	200,686.03
Leominster	15,589.22	44,422.00	.....	28,852.78
Lexington	62,282.89	22,610.00	39,672.89	.....
Lincoln	40,604.52	5,054.00	35,550.52	.....
Lowell	112,138.00	283,556.00	.....	171,418.00
Lynn	132,211.36	277,438.00	.....	145,226.64
Manchester	156,159.18	30,191.00	125,968.18	.....
Marion	31,393.34	8,379.00	23,014.34	.....
Marlboro	13,304.91	34,846.00	.....	21,541.09
Medford	55,142.60	94,164.00	.....	39,021.40
Melrose	83,836.93	51,870.00	31,966.93	.....
Milton	258,777.33	50,274.00	208,503.33	.....
Natick	50,059.64	25,270.00	24,789.64	.....
New Bedford	119,491.80	366,415.00	.....	246,923.20
Newton	965,901.73	202,426.00	763,475.73	.....

Northampton	49,065.15	55,461.00	.....	6,395.85
Norwood	84,538.75	50,939.00	33,599.75	.....
Peabody	25,760.70	68,761.00	.....	43,000.30
Pittsfield	78,440.85	114,513.00	.....	36,072.15
Quincy	72,044.53	135,394.00	.....	63,349.47
14 Revere	5,746.47	66,899.00	.....	61,152.53
Somerville	94,605.18	233,149.00	.....	138,543.82
Springfield	288,227.02	543,704.00	.....	225,476.98
Swampscott	114,952.69	36,309.00	78,643.69	.....
Taunton	66,667.03	92,036.00	.....	25,368.97
Waltham	34,912.35	87,780.00	.....	52,867.65
Watertown	37,087.77	73,283.00	.....	36,195.23
Wellesley	164,193.86	39,501.00	124,692.86	.....
Westfield	7,366.10	39,368.00	.....	32,001.90
Williamstown	38,723.05	12,768.00	25,955.05	.....
Winchester	151,438.65	44,555.00	106,883.65	.....
Woburn	24,478.46	45,078.00	.....	20,608.54
Worcester	352,953.11	590,520.00	.....	237,566.89

Demurrer.

Now comes James Jackson, as he is Treasurer and Receiver-General of the Commonwealth, and demurs to the above-entitled petition for mandamus upon the following grounds:

1. Chapter 314 of the General Acts of 1919 is in all respects constitutional and valid.

2. The petition sets forth no ground for the issuance of a written mandamus against this respondent.

JAMES JACKSON,
Treasurer & Receiver-General,
By WM. HAROLD HITCHCOCK,
His Attorney.

I hereby certify that in my opinion the foregoing demurrer presents a proper subject for judicial inquiry, and it is not filed for purposes of delay.

WM. HAROLD HITCHCOCK.

Filed October 22, 1920.

15 *Order of Court Sustaining Demurrer.*

This case came on to be heard at this sitting upon the defendant's demurrer and was argued by counsel; and thereupon, upon consideration thereof, it is ordered that the demurrer be, and the same is hereby, sustained.

By the Court,

JOHN H. FLYNN,
Assistant Clerk.

[Pierce, J.]

October 22, 1920.

Copy.

Attest,

——— ———,
Clerk.

16 [Endorsed:] No. —. Ernest B. Dane v. Treasurer & Receiver-General. Report, &c. Suffolk County.

17 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Jan. 6, 1921.

In the Case of

ERNEST B. DANE

vs.

TREASURER and RECEIVER-GENERAL,

pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Petition dismissed.
By the Court,

C. H. COOPER,
Clerk.

January 6, 1921.

Copy.

Attest:

—— ——.

18 *Brief Statement of the Grounds and Reasons of the Decision.*

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

19 [Endorsed:] 17503. Law. (6.) No. 3927. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. Ernest B. Dane vs. Treasurer & Receiver-General. Suffolk, ss. Supreme Judicial Court. Filed Jan. 7, 1921. John F. Cronin, Clerk.

20 Whereupon, after a hearing, the following judgment was entered by the Court, to wit:—

21 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

No. 17503, Law.

ERNEST B. DANE

vs.

TREASURER and RECEIVER-GENERAL (JAMES JACKSON).

Judgment.

This case came on to be heard at this sitting upon the respondent's motion for judgment in accordance with the rescript, and thereupon it is ordered that the petition be and the same is hereby dismissed.

By the Court.

JOHN H. FLYNN,
Asst. Clerk.

January 27, 1921.

22 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this second day of February, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] JOHN F. CRONIN,
Clerk.

23 COMMONWEALTH OF MASSACHUSETTS:

Boston, February 1, 1921.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Ernest B. Dane vs. Treasurer & Receiver General decided on the 6th day of January, 1921.

ETHELBERT V. GRABILL,
Reporter of Decisions.

24 RUGG, *C. J.*:

This proceeding is of the same general nature as those before the court in Duffy v. Treasurer & Receiver General, 234 Mass. 42, and Dane v. Treasurer & Receiver General, 236 Mass. 280. As in the earlier cases, it is assumed without decision that the petitioner in his own name may maintain this proceeding and the case is considered

on its merits. The main question at issue in Duffy v. Treasurer & Receiver General, 234 Mass. 42, was the constitutionality of St. 1919, c. 314, which provides for the distribution among the several cities, towns and taxing districts of the Commonwealth of the income tax collected under St. 1916, c. 269, and acts in amendment thereof. The subject then was examined at large and discussed at length and the validity of the statute was upheld. The conclusions there reached were reaffirmed in Dane v. Treasurer & Receiver General, 236 Mass. 280. It is not necessary to restate them. They are accepted as binding so far as applicable in the case at bar.

25 The petitioner contends that the present record contains certain material allegations in addition to those presented in these earlier cases. Only these contentions will be now considered.

1. The circumstance that the income tax is not commingled with and treated as part of the general fund of the Commonwealth established by St. 1917, c. 277, s. 1, but it kept separate and designated as an "Agency Account" by the Treasurer and Receiver General does not affect in any respect the constitutionality of St. 1919, c. 314. The methods of bookkeeping and accounting of a State official have no bearing upon the conformity to the Constitution of the statute by which a state-wide tax is collected and distributed. The principle of long continued interpretation of a statute as evidence of its meaning, recognized in Burrage v. County of Bristol, 210 Mass. 299, and La Roque v. United States, 239 U. S. 62, 64, has no pertinency to the case at bar, where there has been only a single instance of action by the Treasurer and Receiver General.

2. The fact that the distribution of the income tax in accordance with St. 1919, c. 314, for the year 1920, was not made a part of the State budget of that year is of no consequence in deciding whether that statute is constitutional. Article 63 of the Amendments to the Constitution requires a State budget to be prepared annually by the Governor, which shall contain a statement of all proposed expenditures of the Commonwealth for the fiscal year. Upon this budget the general appropriation bill to be enacted by the Legisla-

26 ture must be based. It is not alleged and cannot be successfully contended that St. 1919, c. 314, by its own terms violates any restriction imposed upon the General Court by amendment 63. Since no injunction has been issued in the case at bar, it must be presumed that the distribution required by St. 1919, c. 314, s. 1, was made on or before November 15, 1920. It so was assumed at the argument at the bar. Hence the present petition now must be regarded as directed at the distribution for 1921. No forecast now can be made concerning the action of the Governor or of the General Court for 1921, or their compliance in this particular, if required, with the terms of art. 63 of the Amendments. Provision is made by St. 1919, c. 314, for distribution of taxes collected by the Commonwealth to its subordinate governmental agencies, which themselves appropriate the tax money thus receiver for specific public uses within the limits of their authority. The petitioner is in no postion to queston this.

3. There are allegations in the present petition more specific than those disclosed in Duffy v. Treasurer & Receiver General, 234 Mass. 42, and Dane v. Treasurer & Receiver General, 236 Mass. 280, to the effect that the actual result of the operation of St. 1919, c. 314, in respect of several cities and towns, is, (as said in the petitioner's brief), "unreasonable and arbitrary discrimination between taxpayers in different towns." The general averments of that nature in the earlier cases are not strengthened in principle by the more definite statements in the present record. Factors of this character were considered in 234 Mass. at page 53, and there decided adversely to
27 the contentions of the petitioner. Reference there is made to the report of a joint special committee on taxation presented to the General Court of 1919. Doubtless it was intended by the enactment of St. 1919, c. 314, to adjust to some extent the inequalities of taxation in the several municipalities of the Commonwealth consequent upon the so-called "colonization" in certain cities and towns by "wealthy persons owning intangible [personal] property," as shown in that report. Of course inequalities in taxation cannot be remedied by unconstitutional means. No system of taxation yet has been devised which avoids apparent hardship altogether. While the schedule annexed to the present petition shows that much more is collected from some municipalities than is returned to them under the law, it does not necessarily follow that the general burden of taxation may not nevertheless be fairly distributed throughout the Commonwealth. This point is concluded against the petitioner by the earlier decisions.

Without examining one by one the several provisions of the State and Federal Constitutions which, according to the contentions of the petitioner have been violated, it is enough to say that we are unable to perceive any such infirmity in the statute here assailed. The case at bar is governed in principle in all particulars to which reference has not been specifically made herein by the two decisions last hereinbefore cited.

Petition dismissed.

28 [Endorsed:] Dane vs. Treas. & Rec. Gen. Certified Copy of the Opinion of the Supreme Judicial Court.

29 COMMONWEALTH OF MASSACHUSETTS:

Boston, February 1, 1921.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Ernest B. Dane vs. Treasurer & Receiver General decided on the 7th day of July, 1920.

ETHELBERT V. GRABILL,
Reporter of Decisions.

30 RUGG, *C. J.*:

The record in this case presents no facts differing in any substantial particular from those before the court in Duffy v. Treasurer &

Receiver General and Dane v. Treasurer & Receiver General, 234 Mass. 42. The case at bar is governed by the decision in those cases. For the reasons there stated the entry may be.

Petition dismissed.

31 [Endorsed:] Dane vs. Treas. & Rec. Gen. Certified copy of the opinion of the Supreme Judicial Court.

32 COMMONWEALTH OF MASSACHUSETTS:

Boston, February 1, 1921.

I certify the annexed to be true copies of the opinion of the Supreme Judicial Court in the case of Maurice A. Duffy vs. Treas. & Rec. General Ernest B. Dane vs. Same decided on the 12th day of November, 1919.

ETHELBERT V. GRABILL,
Reporter of Decisions.

32½ RUGG, *C. J.*:

The primary object of these proceedings is to test the constitutionality of St. 1919, c. 314. That act provides for the distribution among the several cities, towns and taxing districts of the income tax collected by the Commonwealth, under the provisions of St. 1916, c. 269, and acts in amendment thereof enacted pursuant to art. 44 of the Amendments to the Constitution. By that amendment full power is granted to the General Court to levy a tax on income, to classify property in respect of income, and to exempt from other taxation property the income of which is thus taxed. One effect of that amendment is to withdraw from the scope of the general requirement of c. 1, s. 1, art. 4 of the Constitution to the effect that all property taxes be proportional, whatever is rightly made subject to the income tax. Tax Commissioner v. Putnam, 227 Mass. 522.

By St. 1916, c. 269, and acts in amendment thereof, the assessment and collection of the income tax is vested in the tax commissioner and his subordinates. These are State officers as distinguished from public officers selected by the various municipalities of the Commonwealth, hitherto under the law chiefly charged with the assessment and collection of property taxes. Incidentally attack is made upon the propriety of this method of assessing and collecting the income tax. The only point within our jurisdiction to consider is whether this method violates any provision of the Constitution. No limitation in the orignal Constitution, in Amendment 44, or in the other amendments, prevents the General Court from committing to a State officer or officers appointed by the Governor, rather than to the assessors and collectors of the several cities and towns, the levy and collection of the income tax. The corporation franchise tax, the foreign corporation, street railway and other excise taxes, are familiar instances of the assessment and collection of certain kinds of taxes through State rather than municipal officers. Their constitutionality in this particular is not open to doubt. The income tax law also, in this respect, is free from

33

any constitutional weakness. The power to tax is a sovereign power. It is an attribute of the Commonwealth. Cities and towns have no inherent power to levy taxes. They can exercise only those powers to tax which have been delegated to them by the General Court as the representative of the Commonwealth. They can levy taxes only on the property and for the purposes established by the General Court acting within its constitutional limitations. Power has not been delegated by the General Court to the several municipalities to levy the income tax. It is retained as a direct incident of sovereignty. The income tax thus is a State tax. The several municipalities have been abolished as taxing districts so far as concerns intangible personal property, which by the income tax
34 law is practically exempted from local taxation because made to contribute what has been determined by the Legislature to be its fair share toward the support of government through the imposition of the income tax. The Commonwealth has been made a single taxing district for this purpose. The income tax is a general tax assessed equally upon all inhabitants of the Commonwealth in proportion to their respective incomes from the designated sources.

The objection mainly urged against the constitutionality of St. 1919, c. 314, relates to the method of distribution of the income tax, when collected, among the cities and towns and taxing districts of the Commonwealth. That method, summarily stated, is for the Commonwealth to pay a progressively diminishing part of the income tax during the ten years ending with 1928 to the several cities, towns and districts having power of taxation, in a proportion based on the difference between the average amount of the tax levied upon personal property in such city, town or district for 1915 and 1916 (being the last two years before the operation of the income tax law when taxes were levied in the several cities, towns and taxing districts upon all personal property, including both intangible and tangible), and the average amount as computed by the Tax Commissioner that would be produced by a tax upon the personal property actually assessed in each city, town or district for 1917 and 1918 (being the first two years when the income tax was in operation and intangible personal property was exempted from local taxation and only tangible personal property was actually assessed), at an average of the rates of taxation which prevailed in 1915 and 1916, the bal-
35 ance of the income tax each year in excess of that part needed to make such payments, and the entire income tax subsequent to the expiration of ten years (after reimbursing the Commonwealth in every year for the expenses incurred and abatements made in the transactions), to be paid by the Commonwealth to the several cities and towns in proportion to the amount of the State tax imposed upon each in such year.

The several statutes enacted since the income tax law went into operation have contained as a fundamental element provision for making up to the several cities, towns and taxing districts, out of the income tax collected by the Commonwealth, as near as could readily be calculated, the losses sustained by them through the exemption from local taxation of the intangible personal property.

which before the enactment of the income tax law had been subject to local taxation. The income tax, however, has yielded a revenue much larger than is required to make good these losses. The statute here assailed is an attempt on the part of the General Court to deal with the subject in a more comprehensive and permanent way than was possible before results were available from experience in the actual working of the income tax law.

The method embodied in the present statute is the assessment and collection of the income tax by State officers according to fixed principles of State wide application. Such unification of the territory of the Commonwealth in this particular obviates differences likely to arise through divergences of opinion and practice almost inevitable among local taxing and collecting officers of the several municipalities. Out of the sums thus collected as income tax the Commonwealth retains nothing for defraying distinctively State charges. It keeps only enough to reimburse itself for the ex-
36 penses incurred in administering the law. The entire sum thus collected, after deducting expenses, is distributed amongst the cities, towns and taxing districts of the Commonwealth. A part of this distribution for a limited period is for the purpose of making up to them in diminishing proportion the loss in intangible personal property taxable locally occasioned by the scheme of the income tax law, and the rest is distributed in proportion to the amount of State tax assessed upon the several municipalities. The State tax is assessed now upon the several municipalities in proportion to the valuation of the real estate and of the tangible personal property in each, omitting all consideration of intangible personal property owned by the inhabitants of each. The distribution of the income tax confessedly is not made to the municipalities on the footing of the amount of income tax collected from their inhabitants. That factor is ignored. The design of the statute is that the income tax shall be collected at large throughout the Commonwealth and distributed to the municipalities in ratio to the valuation of all the property therein now made subject to taxation according to c. 1, s. 1, art. 4 of the Constitution, requiring proportional and reasonable taxes.

This contravenes no provision of the Constitution. The income tax is collected from the entire population of the Commonwealth, so far as liable under the law to such taxation. The territory of the Commonwealth constitutes a single taxing district for that purpose. The distribution of the tax is made throughout the entire Commonwealth. No part is excluded from the distribution. Every city and town shares in a definite ratio. No political subdivision is selected for special discrimination or unusual favor. All are treated
37 alike in accordance with the one uniform rule embodied in the statute. The distribution is made upon a basis different from that on which the collection is made. But it is upon a basis recognized by law and practice as just for the levying of the State tax. It hardly could be contended that the foundation upon which the State tax rests is unconstitutional because irrational, whimsical or arbitrary.

It is manifest that the uses to which the income tax can be devoted must be wholly public. Money raised by taxation can be disbursed only for public uses and not in any sense for the private advantage of individuals. The money when distributed to the several cities and towns is affected with the same public interest as when in the treasury of the Commonwealth. It can be appropriated and expended only for public purposes. Lowell v. Boston, 111 Mass. 454. Wheelock v. Lowell, 196 Mass. 220. Opinion of the Justices, 204 Mass. 607, and 211 Mass. 624. Freeland v. Hastings, 10 Allen, 570. Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371. Whittaker v. Salem, 216 Mass. 483. There is nothing on this record to justify the assumption that the several municipalities design to devote to other than a public use any portion of the income tax thus distributed to them. Every presumption is in favor of legality in the absence of evidence to the contrary. Doherty v. Ayer, 197 Mass. 241, 248. Collector of Taxes of Boston v. Rising Sun Street Lighting Co. 229 Mass. 494, 497. Bank of United States v. Dandridge, 12 Wheat. 64, 69, 70. Cincinnati, New Orleans & Texas Pacific Railway v. Rankin, 241 U. S. 319, 327.

The town system of government is recognized and preserved by the Constitution, Commonwealth v. Plaisted, 148 Mass. 375,
38 384-386. Opinion of the Justices, 229 Mass. 601, 607. Yet the power of the General Court over municipalities as agencies of government is extensive. Weymouth & Braintree Fire District v. County Commissioners, 108 Mass. 142. Rawson v. Spencer, 113 Mass. 40. Kingman, petitioner, 153 Mass. 566, 573. That power has not been transcended in the present statute. The exemption of intangible property from local taxation, leaving only tangible personal property and real estate subject to taxation by the cities and towns, is not such an invasion of the system of town government as to violate the Constitution. A large field of taxation is still left to the municipalities, and the distribution of the income tax affords a kind of substitution for a source of revenue taken over by the Commonwealth.

It is a general principle of the law of taxation that the people of one district cannot be taxed for the benefit of another district. Hampshire v. Franklin, 16 Mass. 76. Norwich v. County Commissioners, 13 Pick. 60. Dorgan v. Boston, 12 Allen, 223, 235-237. Thomas v. Gay, 169 U. S. 264. Beach v. Bradstreet, 85 Conn. 344, 357. That principle is not violated by the statute here in question, because the State is the taxing district and the distribution is to all the municipalities in the State, although the basis of collection and distribution is not the same. The application of this principle is familiar in other connections. The Commonwealth has been made a single district for the care of the insane and for the construction and maintenance of State roads, public objects the control of which formerly was vested wholly or partly in the several municipalities. There is a strong similitude in the establishment and admin-
39 istration of the Massachusetts school fund. See St. 1834, c. 169; R. L. c. 41. The expenditures made by the Commonwealth for these public objects in immediate benefit to the several

cities and towns bear no direct relation to the contributions made by them to the public revenue.

The income tax law must be considered as a part of and in relation to the entire scheme of taxation established by the law. It does not stand alone as a mere collection of one kind of tax for redistribution on a different basis. The distribution of the income tax, although not in proportion to the amounts collected from the several municipalities, is a means of apportioning the ultimate burdens of the support of government. The Legislature is not confined to a single method in apportioning public expenses or raising the money to defray them. Provision was made by St. 1837, c. 85, for the distribution of certain public moneys among the several cities and towns according to population. Although that statute was before this court several times, it never was intimated that it was unconstitutional in that particular. Simmons v. Hanover, 23 Pick. 188. Cooley v. Granville, 10 Cush. 56. Pope v. Halifax, 12 Cush. 410. Apportionments of the expenses of the Metropolitan sewer system and of the Metropolitan park system have been made according to valuation of the several municipalities in the districts, and according to percentages made up of a combination of valuation and population, and again according to a classification expressly framed to make richer towns bear a proportionately larger share of the burden than poorer towns. All these methods have been held not unconstitutional. In re Metropolitan Park Commissioners, petitioners, 209 Mass. 381, and cases collected at page 384. In these instances the element of special benefits conferred by particular public
40 works was present, which is absent in a scheme for general taxation. That element, however, was not made the exclusive determining factor in the apportionment of expenses. These cases are illustrative of the broad considerations pertinent to the equalization of the burdens of taxation under the Constitution.

The case at bar is indistinguishable in principle from Lowell v. Oliver, 8 Allen, 247, where a statute was upheld by which a general tax was levied to be distributed among the several cities and towns in reimbursement of bounties paid to volunteers in the Civil War. Such distribution was not in proportion either to valuation, to population, or to the amount of tax collected from the several towns. Imposition of expense of armories for the use of militia upon the municipalities where located is upheld, although the maintenance of the militia is manifestly an expense of the Commonwealth for the protection of its sovereignty. Hodgdon v. Haverhill, 193 Mass. 406. See Stetson v. Kempton, 13 Mass. 272.

It scarcely need be said that the adoption of Amendment 44 to the Constitution, except to the extent therein expressly stated, has not abrogated the restriction upon the power of the General Court contained in c. 1, s. 1, art. 4 of the Constitution to impose and levy only "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the" Commonwealth. The power to levy an income tax cannot be employed either openly or covertly as an instrument to narrow or circumvent the requirement for proportional taxes upon all property

other than incomes. The present statute bears no indication of such a purpose.

41 Some inequalities in the effect of the operation of the statute have been pointed out in argument. No system of taxation yet has been devised which attains the ideal of apportioning the public expenses among taxpayers in exact accordance with ability to pay. Benefits conferred by government upon individuals or territorial subdivisions cannot be adjusted with precise equality in relation to the amounts exacted in way of taxation and the resources to meet such exactions. The present statute was passed pursuant to a purpose to equalize the burdens of taxation throughout the Commonwealth. It was enacted in substantial accordance with the recommendation of a joint special committee of the General Court of 1918 presented after careful study and investigation to the General Court of 1919. Its apparent aim was to apportion the entire burden of taxation so that it would be more nearly equal than hitherto. The inequalities to which attention has been called in argument appear to be no more than may be encountered in a rationally devised system of taxation.

The present statute is a departure in important particulars from any tax law which has hitherto been enacted in this Commonwealth. It seems to go almost to the verge of constitutional power. The clauses of the Constitution chiefly relied upon as preventing its validity are those requiring proportional taxation, c. 1, s. 1, art. 4, and prohibiting the payment of money from the treasury of the Commonwealth except "for the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof," c. 2, s. 1, art. 11. For the reasons already

42 stated and for those elaborated in Kingman, petitioner, 15 Mass. 566, the present statute cannot be said to be obnoxious to these or other provisions of our fundamental law.

It has been argued that the statute contravenes the guaranty of equal protection of the laws and that against being deprived of property without due process of law contained in the Fourteenth Amendment to the United States Constitution. Of course, the provisions of that amendment are the law of the land and the exposition of their meaning by the Supreme Court of the United States is of binding force. We are unable to perceive anything in the present statute which violates those provisions. The income tax is levied by the State equally upon all made subject to the tax, according to valid classifications, for public purposes, and can be expended only for those purposes. Attention was called in argument to the decisions in Thomas v. Gay, 169 U. S. 264, 276, and Cole v. La Grange, 113 U. S. 1. No discussion seems to us to be required to demonstrate that the principles declared and applied in those decisions do not invalidate the present statute. While it was held in those decisions that taxes could be levied only for public purposes and expended only for public objects, and that the duty and obligation to pay taxes is founded on participation in benefits arising from the promotion of the public welfare, it also was recognized that in the practical administration of these principles it was not necessary that a specific personal advantage be pointed out as accruing to each taxpayer

taxpaying district. It is enough if some general plan be followed which is not discriminatory, arbitrary or fanciful in its operation, and which confines expenditures to public purposes.

43 & 44 All the arguments advanced in behalf of the petitioners have been carefully considered, but it is not necessary to discuss them in further detail.

In each case let the entry be

Petition dismissed.

[Endorsed:] Duffy vs. Treas. & Rec. Gen. Dane vs. Same. Certified copy of the opinion of the Supreme Judicial Court.

45 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

No. 17503.

ERNEST B. DANE
v.
JAMES JACKSON, Treasurer and Receiver-general.

Petition for Writ of Error and Assignment of Errors.

Your petitioner, Ernest B. Dane, plaintiff in the above entitled proceeding, represents that errors of law appear in the record in this case.

That the plaintiff is a resident of the Town of Brookline in the Commonwealth of Massachusetts and is the owner of certain intangible personal property situated in said Brookline which is subject to taxation under the provisions of Chapter 269 of the General Acts of the year 1916 of the General Court of Massachusetts; that he is in receipt of an income from professions, employments, trade
46 or business carried on in said Brookline taxable under said Chapter; and that by virtue of the provisions of Chapter 314 of the General Acts of the year 1919 of the General Court of Massachusetts the revenue derived from such taxes is distributed among the cities and towns of the Commonwealth in proportion to the value of the real estate and tangible personal property situated in each city or town and as a result the greater part of the taxes so assessed upon said intangible property and income are assessed for the benefit of cities and towns in Massachusetts other than said Brookline in which cit-es and towns the plaintiff neither lives nor owns any property and the money so raised will be expended for purposes of no use and benefit to the plaintiff or to his property and in the selection of which neither the plaintiff nor any other inhabitant of Brookline paying the taxes as aforesaid will have any voice either directly or through his representatives.

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to

wit, the Supreme Judicial Court of the Commonwealth and there decided adversely to the plaintiff's contentions and adversely to the existence of the Federal rights claimed.

Wherefore he respectfully petitions for a writ of error to the Supreme Judicial Court sitting at Boston within and for the County of Suffolk and Commonwealth of Massachusetts and files herewith his assignment of errors as follows, to wit:

47 1. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 authorizing the levy of a tax which is not for the use of the district taxed were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of his property without due process of law.

2. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 authorizing the expenditure of money raised by taxation throughout the state at large for the private and proprietary purposes of particular municipalities and thus imposing an obligation to pay taxes upon individuals which is not founded on their participation in the benefits arising from the expenditure of the money so raised were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of his property without due process of law.

3. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 authorizing the expenditure of money raised by taxation for purposes in the choice of which those who pay the taxes have no voice were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of his property without due process of law.

4. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 authorizing the distribution of
48 the proceeds of the tax on intangible personal property and the incomes from professions, employments, trade or business among the various cities and towns of the Commonwealth in proportion to the wealth of such cities and towns in real estate and tangible personal property were not in violation of the Fourteenth Amendment to the Constitution of the United States as denying the plaintiff the equal protection of the laws.

5. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 diminishing the taxing power of the Town of Brookline by taking away a large proportion of its taxable property were not in violation of Article 1, Section 10 of the Constitution of the United States as impairing the obligation of contracts, previously entered into by divers other parties with said Town on the faith of its power to tax the intangible personal property of its inhabitants.

6. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 authorizing the levy of a tax for a private use, namely to exempt certain arbitrarily selected tax payers from

paying their fare share of the public burdens were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of his property without due process of law.

7. The Court erred in deciding that the provisions of Chapter 314 of the General Acts of 1919 were not in violation of the Four-
49 teenth Amendment to the Constitution of the United States as denying the plaintiff the equal protection of laws.

ERNEST B. DANE,
By PHILIP NICHOLS,
CHOATE, HALL & STEWART,
R. A. STEWART,
Attorneys.

50 [*Copy of Bond on Writ of Error.*]

Know all Men by these Presents, That we, Ernest B. Dane of Brookline in the County of Norfolk and Commonwealth of Massachusetts as principal, and the American Surety Company of New York a corporation organized and existing under the laws of New York and having its principle office in said New York as surety are held and firmly bound unto James Jackson of Westwood in the County of Norfolk in the full and just sum of five hundred dollars ($500), to be paid to the said James Jackson or to his certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the twenty-sixth day of January in the year of our Lord one thousand nine hundred and twenty.

Whereas lately at a sitting of the Supreme Judicial Court of Massachusetts holden at Boston within and for the County of Suffolk in a suit depending in said Court between Ernest B. Dane, plaintiff, and said James Jackson, defendant, on a petition for writ of mandamus judgment was rendered against the said Ernest B. Dane dismissing his said petition and the said Ernest B. Dane having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Jackson citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said Ernest B. Dane shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ERNEST B. DANE.
AMERICAN SURETY COMPANY [L. S.]
OF NEW YORK.
By FRED L. ROBERTS,
Resident Vice-Pres.

Signed, sealed, and delivered in the presence of—

Attest:
GEORGE F. FELLOWS,
Resident Asst. Sec.

Approved:
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of Massachusetts.

A true copy of the bond taken by the Judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts.

Attest:
JOHN F. CRONIN,
Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts.

51 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Jackson, of Westwood, in the County — Norfolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* twenty-sixth day of February next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts wherein Ernest B. Dane of Brookline in the County of Norfolk and Commonwealth of Massachusetts is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this twenty-eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court.

*Not exceeding 30 days from day of signing.

†Name of Court to which Writ of Error is directed.

52

January 28, 1921.

Due and sufficient service of the within citation is hereby acknowledged and accepted.

WM. HAROLD HITCHCOCK,
Attorney for Defendant in Error.

53 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

Law, No. 17503.

ERNEST B. DANE

v.

JAMES JACKSON, Treasurer and Receiver-General.

Præcipe.

To the clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth aforesaid:

Please incorporate into the transcript of the record to accompany your return to the writ of error:

1. Report to the Full Court.

2. Petition for writ of mandamus.

3. Demurrer.

4. Order sustaining demurrer.

5. Re-script.

6. Final judgment.

54 7. Copy of petition for writ of error and assignments of error.

8. Copy of bond.

9. Citation and proceedings thereon.

10. Copy of opinion of Full Bench in the above entitled proceeding.

11. Copy of opinion of Full Bench in Ernest B. Dane v. Charles L. Burrill, Treasurer and Receiver-General.

12. Copy of opinion of Full Bench in Ernest B. Dane v. Fred J. Burrell, Treasurer and Receiver-General.

counsel for the plaintiff deeming the above portions of the record and other documents to be material to and necessary for a decision of the questions involved.

Respectfully, CHOATE, HALL & STEWART.
R. A. STEWART.

I, Charles O. Pengra of Choate, Hall & Stewart of counsel for the plaintiff in error in the above entitled proceedings hereby certify, declare and state that I have served a copy of the foregoing
55 præcipe on the defendant in error by sending on January 27, 1921 a copy thereof by registered mail, postage prepaid, addressed to William H. Hitchcock, his attorney, at his usual place of business, 1026 Tremont Building, Boston, Massachusetts.

CHARLES O. PENGRA.

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Subscribed and sworn to this 27th day of January 1921.
Before me,
[SEAL.] JAMES GARFIELD,
Notary Public.

My commission expires Dec. 27, 1926.

56 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereto annexed are an exemplification of the record in the case of Ernest B. Dane, Petitioner v. Treasurer and Receiver General, Respondent in said Supreme Judicial Court determined; and attached thereto and transmitted with said record are copies of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions in the cases of Dane v. Treasurer and Receiver General [James Jackson,] Dane v. Treasurer and Receiver General [Charles L. Burrill;] Dane v. Treasurer and Receiver General [Fred J. Burrell]. A copy of the Application for Writ of Error, a copy of the Assignment of Errors, Bond and the original Citation with acceptance of service endorsed thereon.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, the second day of February, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] JOHN F. CRONIN,
Clerk.

Endorsed on cover: File No. 28,077. Massachusetts Supreme Judicial Court. Term No. 720. Ernest B. Dane, plaintiff in error, vs. James Jackson, treasurer and receiver-general. Filed February 5th, 1921. File No. 28,077.

Office Supreme Court, U.
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APR 13 1921
JAMES D. MAHER
CLE

Supreme Court of the United States.

October Term, 1920.

No. 720.

ERNEST B. DANE,
PLAINTIFF IN ERROR,

v.

JAMES JACKSON, TREASURER AND RECEIVER GENERAL.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Plaintiff in Error.

PHILIP NICHOLS,
RALPH A. STEWART,
CHARLES O. PENGRA,
Counsel for Plaintiff in Error.

ADDISON C. GOODRICH & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 720.

ERNEST B. DANE, PLAINTIFF IN ERROR,

v.

JAMES JACKSON, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR ERNEST B. DANE, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The case arises on a petition for writ of mandamus, brought originally in the Supreme Judicial Court of Massachusetts for the County of Suffolk, against the Treasurer and Receiver General of the Commonwealth of Massachusetts, and is based upon a state of facts in substance as follows:

Prior to the year 1917 the system of taxation for state and municipal purposes which had been in force in Massachusetts for many years was as follows: The revenues of the state were raised in part by excise taxes of various kinds, of which in recent years the most important were the corporate franchise tax and the inheritance tax. An uncertain and variable amount was raised each year by these taxes, and the

remainder of the sum required to meet the annual appropriations of the legislature and payments on the bonded indebtedness of the state was raised by an annual levy in the nature of a deficiency bill, known as "the state tax," by which the sum required for state purposes was assessed upon the different cities and towns of the state in proportion to the value of the taxable property within each city or town, and the polls taxable therein, with polls reckoned at one tenth of a mill for each one thousand dollars of the state tax, a valuation for the purposes of the state tax being made triennially. Each city and town raised the amount required to meet both its share of the state tax and the appropriations which it had itself made for municipal purposes by assessing a tax at a uniform rate upon all the real estate situated therein, and upon all the personal property of the inhabitants of the city or town, subject to certain exceptions, which are not now material, by which certain classes of tangible personal property were assessed where located rather than at the domicil of the owner. The tax rate was determined by dividing the total amount to be raised by the total value of the taxable property within the city or town.

Intangible personal property, such as bonds, notes, money at interest, public securities, and stocks in corporations, was assessed under the general provisions of law at the domicil of the owner, in the same manner as tangible personal property (St. 1909, c. 490, part 1, sec. 4, clauses 2, 3). All this property, real and personal, tangible and intangible, was assessed at its fair cash capital value. Although the law provided in general terms for the taxation of all intangible prop-

erty, certain classes of intangible property were exempted, either on account of lack of power of the state to tax them, or because of specific statutes which exempted them altogether as a matter of public policy, or because the taxation of the property which the securities represented was provided for in some other way. In the first of these classes fell bonds of the United States; in the second, such bonds of the Commonwealth of Massachusetts and of the cities and towns therein as had been issued after a certain date when such bonds became non-taxable; and in the third class, mortgages upon Massachusetts real estate, stock in Massachusetts corporations, and in a few foreign corporations which paid a franchise tax in Massachusetts, and deposits in savings banks. These exceptions left in substance two main classes of intangible property which were subject to the direct property tax, namely, (1) stocks in foreign corporations and (2) bonds, notes, and other debts not falling within any of the exempted classes.

In many of the towns, especially in residential towns in which there was no large amount of manufacturing done and no important commercial center, the taxable intangible property constituted a large part of the taxable property within the town. In Brookline, for example, in which the petitioner lived, the intangible property actually assessed at its capital value in the year 1916 constituted about one half of the total taxable property within the town (Petition, par. 3) (Rec. p. 5).

Prior to 1915 the Constitution of Massachusetts required all direct taxation to be proportional, and this provision was construed to require the taxation of all

property within the same town at the same rate, so that the method of taxing intangible property then in force was the only one available, but in 1915 the 44th Amendment to the Massachusetts Constitution was adopted, authorizing the taxation of such classes of property as the legislature should select upon an income basis and authorizing the exemption of property so taxed from all other taxation. In 1916 the legislature enacted a statute (chapter 269 of the General Acts of 1916, generally known as the Income Tax Act) providing for the taxation of certain classes of incomes, the most important provision of which is found in section 2 of the act. The effect of section 2 was to subject all the various classes of intangible personal property which had previously been taxed directly upon their capital value at the local rate (except shares in national banks) to a tax upon annual income at the fixed rate of 6 per cent. By section 11 of the act, property the income of which was taxed was itself exempted from taxation. There was a further provision in section 2 for the taxation under certain circumstances of the dividends on shares in partnerships, associations, or trusts, the beneficial interest in which was represented by transferable shares (the so-called "Massachusetts Trusts") which had previously not been taxed as such, but this provision was of minor importance. The other important provision of the Income Tax Act is found in section 5, subsection *b*, which imposes a tax of 1½ per cent upon annual income over two thousand dollars from professions, employments, trade, or business. Prior to the enactment of this statute, income of this character had been taxed in the city or town in which the person earning it

dwelt, at the same rate as the tax upon property. It is to be noted that the Massachusetts income tax is not a general income tax, like the federal income tax or the income taxes in force in New York, Wisconsin, and several other states, but a tax on certain kinds of income only; and real estate, mortgages, stocks in domestic corporations, savings-bank deposits, and other large classes of income-producing property are not taxed on their income in Massachusetts, but are reached by taxation in some other way.

The taxes imposed by the Income Tax Act are assessed at a uniform rate throughout the Commonwealth, and the duty of assessing and collecting the tax is imposed upon the office of the state tax commissioner, but the tax is not assessed for state purposes, and during each year in which it has been assessed, provision has been made by law for distributing the entire amount raised, in excess of the cost of assessment and collection, to the various cities and towns of the state, to be used by them for their own municipal purposes.

The tax has always been treated as a municipal tax rather than as a state tax, and the state officials who assess, collect, and distribute the tax are recognized by the state as performing these functions as agents of the municipalities which receive the revenue rather than of the state. Thus the amount raised by the tax on incomes is not paid into the general fund of the Commonwealth, but is kept separate as an "Agency Account" (Petition, par. 11) (Rec. pp. 6, 7). The Constitution of Massachusetts requires (Amendment 63) that all the taxes and revenues and all the expenditures of the Commonwealth shall be included

in an annual budget; but the income tax is not included in the budget as a tax or revenue of the Commonwealth, nor is its distribution to the cities and towns included as an expenditure of the Commonwealth (Petition, par. 14) (Rec. pp. 8, 9). In fact it is specifically alleged in the petition, and admitted by demurrer, that the tax is levied wholly for the use of the cities and towns of the Commonwealth (Petition, par. 11) (Rec. pp. 6, 7).

Under section 23 of the original Income Tax Act it was provided, by the establishment of a formula which would bring about such a result as nearly as practicable, that each town should receive a share of the proceeds of the income tax equal to the sum which it would have received if the statute authorizing the taxation of intangible personal property by the towns had remained in force. The balance, if any, was to be distributed in proportion to the contribution of the various cities and towns to the state tax. It was specifically provided that this measure of distribution should remain in force but a single year, and thereafter the distribution among the cities and towns should be as the legislature might determine. This sufficed for the distribution during the year 1917, the first year of the tax, when the act was more or less in the nature of an experiment. In the following year, a similar provision was made for the distribution of the income tax, which was in terms applicable only to the tax collected in the year 1918. In 1919, however, a statute was enacted providing for the permanent distribution of the proceeds of the income tax, which in substance, after first establishing a formula for determining the amount which the towns would have

received if the old statute had remained in force, provided for the gradual change of the method of distribution extending through a ten-year period from a distribution based primarily on what the towns would have received if the old law had remained in force, with the excess distributed in proportion to each town's share of the state tax, to a distribution wholly based upon each town's proportion of the state tax. At the end of the ten-year period and thereafter the entire proceeds of the income tax will be distributed in proportion to the share of each city or town in the state tax.

The amount of the state tax in 1919 was considerably less than the amount raised by the income tax. Since 1919, when the first triennial valuation was made after the intangibles had been omitted from direct taxation, the state tax has been apportioned among the cities and towns of the state in proportion to the value of the real estate, tangible personal property, and polls taxable therein, with polls reckoned at one tenth of a mill for each one thousand dollars of the state tax, and intangible personal property now plays no part in determining the burden of the state tax.

The petitioner is a resident of the town of Brookline and owner of certain real estate taxable therein. He is also the owner of certain intangible personal property, the income of which is taxable under the statute already referred to. The securities constituting or representing such property are kept by him in Brookline, and they are not based upon and do not derive their value from property situated or business carried on in any other city or town in the state, and are not used in connection with any business carried on any-

where outside of Brookline. He is also in receipt of an income from business carried on in Brookline and in no other city or town. It appears (Petition, par. 10) (Rec. p. 6) that over one million dollars will be collected in each year from the inhabitants of the town of Brookline on account of intangible personal property owned by them and having no situs anywhere in the state outside of Brookline and from incomes earned by them in Brookline; and that, by reason of the fact that Brookline is not a manufacturing or commercial center, and the value of the real estate and tangible personal property in the town is not proportionately as great as the intangible personal property, when this money is collected by the state and distributed to the various cities and towns, even at the present time, when the new method of distribution has only partially gone into effect, less than half of the money paid by the petitioner and other inhabitants in Brookline on account of property located or incomes earned in Brookline will be returned to Brookline, and when the new method has gone fully into effect, less than one quarter of the money so paid will be returned, and the remainder will be turned over to other cities and towns in the state to be used by them for their own private and proprietary purposes if they so elect. As a result the petitioner is taxed as to a greater part of the income tax imposed by the statute referred to, not for the benefit of the state, nor for the benefit of the county in which the town of Brookline is situated, nor for the benefit of the town of Brookline, but for the use and benefit of other cities and towns in the state, in which he neither lives nor owns any property.

There are in the Commonwealth of Massachusetts a number of cities and towns containing large manufacturing establishments and important commercial districts, in which land is very valuable and where large and valuable buildings have been erected; and the taxes on the real estate and tangible personal property in such cities and towns furnish ample revenue for such cities and towns; there are in the Commonwealth other cities and towns containing few manufacturing establishments and no important commercial districts, and such towns are obliged to depend for their revenues upon the taxable intangible property and incomes of their inhabitants, and the town of Brookline falls within the latter class. As a result of these conditions the towns in the former class will receive from the proceeds of the income tax much more than their inhabitants contribute thereto or than is derived from property situated or business carried on within their limits, and the towns in the latter class will receive much less, as is shown in a table annexed to the petition (Rec. pp. 13, 14, 15). As a result of the diversion of the taxes paid by the petitioner and the other inhabitants of Brookline to other cities and towns, a great and disproportionate burden is placed upon the petitioner's real estate and the real estate situated in Brookline.

It is this which he contends is unconstitutional. The statute was enacted on July 15, 1919, to take effect with respect to the distribution of the tax collected in that year, and, being subject to the referendum provisions of the state Constitution, did not go into effect until ninety days after its enactment. As soon as the law went into effect a petition for mandamus was

brought against Charles L. Burrill, who was then Treasurer and Receiver General of the Commonwealth, asking that he be directed not to distribute the tax in the manner provided by the 1919 statute. The defendant demurred to the petition and the matter was referred to the full bench of the Supreme Judicial Court, which decided in favor of the respondent, and the case was duly taken on writ of error to the Supreme Court of the United States. Subsequently to the decision of the Supreme Judicial Court the term of Charles L. Burrill as Treasurer and Receiver General expired, and Fred J. Burrell succeeded him in office, and a second petition was brought against Fred J. Burrell with respect to the distribution of the income tax in the year 1920. This also was dismissed by the Supreme Judicial Court of Massachusetts and taken on writ of error to the Supreme Court of the United States, but before it could be reached for argument Fred J. Burrell resigned his office and James Jackson was appointed in his place and still holds the office, and the present petition was at once brought against James Jackson.

The points upon which the petitioner relies are the following:

(1) That the statute of 1919 is in violation of the Fourteenth Amendment to the United States Constitution in providing for the levy of a tax which is not for the use of the district taxed.

(2) That the statute of 1919 is in violation of the Fourteenth Amendment to the United States Constitution in necessarily bringing about a purely arbitrary and unreasonable discrimination against the plaintiff and others similarly situated in the taxation of their real estate.

Statutes Material to the Case.

(1) The Income Tax Act.

General Acts of 1916, Chapter 269, Section 2, as amended by Chapters 7 and 120 of the General Acts of 1918:

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

(a) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

First: Deposits in any savings bank chartered by this commonwealth or in the Massachusetts Hospital Life Insurance Company, or such of the deposits in the savings department of any trust company so chartered as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto, and deposits in any bank situated in the state of New Hampshire, so long as the provisions of chapter one hundred and eighty-nine of the Public Acts of nineteen hundred and seventeen of that state remain in force, and deposits in any bank in any other state which exempts from taxation to its inhabitants similar deposits, and interest and dividends thereon, owned by such inhabitants in banks in this commonwealth.

Second: Bonds of the United States and such bonds, notes and certificates of indebtedness of the commonwealth and of political subdivisions thereof as are exempt from taxation under the provisions of clause fif-

teen of section five of Part I of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto.

Third: Loans secured exclusively by mortgages or real estate, taxable as real estate, situated within the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate.

(b) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except national banks and except such foreign corporations as are subject to a tax upon their franchises payable to this commonwealth under the provisions of sections forty-three and fifty-two of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto.

(c) Dividends on shares in partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, except dividends on shares of the following:

First: Partnerships, associations or trusts, which file with the tax commissioner the agreement hereinafter provided for, and the property of which consists exclusively of one or more of the following specified kinds of property, to wit:—real estate wherever situated and supplies therefor and receipts therefrom; stocks of corporations taxable under the provisions of sections forty-three and fifty-two of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto; bonds, notes, loans se-

cured by mortgage of real estate, and certificates of indebtedness, the income of which is exempt from taxation under the provisions of this section, property the income of which, if any, would be taxable under this section if owned by an inhabitant of the commonwealth; shares in partnerships, associations or trusts, dividends on which are exempt from taxation under this section.

Second: Partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, which file such agreement and furnish satisfactory proof to the tax commissioner that two thirds, at least, of their taxable property is taxed within the commonwealth and that the remainder, if taxable, is taxed where it is situated.

Partnerships, associations or trusts, the dividends on shares of which are exempt from taxation under this section, shall pay to the tax commissioner annually a tax of six per cent of the income derived from any property owned by such partnerships, associations or trusts, so far as such income would be taxable under this section if received by an inhabitant of the commonwealth.

Dividends on the shares of any partnership, association or trust, of the classes designated in paragraphs first and second of subsection (c) of this section shall be subject to taxation under this section unless the trustees or managers of such partnership, association or trust shall file with the tax commissioner, in such form as he shall determine, its agreement to pay to the commonwealth annually the tax imposed by the preceding paragraph and any tax imposed by section five of this act. In case of any breach of the terms

of any such agreement, the same may be enforced by information in equity to be brought by the attorney-general at the relation of the tax commissioner in the supreme judicial court for the county of Suffolk. This remedy shall be in addition to all other means of collection provided by this act, and to the penalties hereinafter imposed.

For the purposes of this act any securities of the classes designated in this section, held in pledge, or on margin or otherwise, by an agent or broker as security for a debt of the principal, whether such securities stand in the name of the principal or of any other person, shall be deemed to be the property of the principal, and the income arising therefrom shall be included in the total income of the principal under this section.

No distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section; but accumulated profits shall not be regarded as capital under this provision.

Section 5:

Income of the following classes received by any inhabitant of this commonwealth, during the calendar year prior to the assessment of the tax, shall be taxed as follows: . . .

(b) The excess over two thousand dollars of the income, as defined in section six, derived from professions, employments, trade or business shall be taxed at the rate of one and one half per cent per annum. In determining such income the rental value of living quarters furnished any individual as part of his compensation shall be included. The wages and salaries

of employees and officers of the United States government shall not be taxed; but if such employees and officers receive other income taxable under this section, that part of such other income shall be taxed which, when such other income is added to the amount of the wages or salary received as an employee or officer of the United States government, shall be in excess of two thousand dollars.

Section 11:

After the year nineteen hundred and sixteen, income which is taxable under the provisions of section five of this act, and, except as provided in section twenty-one, property, whether held by an executor, administrator, trustee or otherwise, the income of which, if any, is taxed or would be taxable under the provisions of section two of this act if received by an inhabitant of this commonwealth, shall be exempt from taxation under the provisions of chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto; . . .

(2) The provision for distribution in the original Income Tax Act (applied in 1917).

General Acts of 1916, Chapter 269, Section 23:

On or before the fifteenth day of November in the year nineteen hundred and seventeen the treasurer and receiver general shall pay to each city or town an amount equal to the difference between the amount of the tax levied upon personal property in such city or town in the year nineteen hundred and fifteen and the amount, computed by the tax commissioner, that would

be produced by a tax upon the personal property actually assessed in such city or town for the year nineteen hundred and seventeen at the same rate of taxation as prevailed therein in the year nineteen hundred and fifteen. If the amount of taxes collected from incomes shall exceed the sum necessary to make such payments, the balance shall be distributed among the several cities and towns in proportion to the amount of the state tax imposed upon each of them in the year nineteen hundred and seventeen: provided, that of the aforesaid excess the commonwealth shall retain a sum sufficient to reimburse it for the expenses incurred under this act during the year nineteen hundred and seventeen, and abated taxes repaid hereunder during said year. In years subsequent to nineteen hundred and seventeen, the taxes collected under this act shall be distributed as the general court may determine.

(3) The provision for distribution enacted in 1917 for the year 1918 and applied in that year.

General Acts of 1917, Chapter 317, as amended by General Acts of 1918, Chapter 154:

On or before the fifteenth day of November in the year nineteen hundred and eighteen the treasurer and receiver general shall pay to each city or town and to each fire, water, improvement, light and watch district having the power of taxation, an amount equal to the difference between the amount of the tax levied upon personal property in such city, town or district in the year nineteen hundred and sixteen and the amount, computed by the tax commissioner, that would be produced by a tax upon the personal property actually assessed in such city, town or district for the year nine-

teen hundred and eighteen at the same rate of taxation as prevailed therein in the year nineteen hundred and sixteen. If the amount of taxes collected from incomes shall exceed the sum necessary to make such payments, the balance shall be distributed among the several cities and towns in proportion to the amount of the state tax imposed upon each of them in the year nineteen hundred and eighteen: provided, that of the aforesaid excess the commonwealth shall retain a sum sufficient to reimburse it for the expenses incurred under this act during the year nineteen hundred and eighteen, and abated taxes repaid hereunder during that year. In years subsequent to nineteen hundred and eighteen, the taxes collected under the provisions of chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen and acts in amendment thereof shall be distributed as the general court may determine.

(4) THE PROVISION FOR DISTRIBUTION ENACTED IN 1918 FOR THE YEAR 1919, BUT REPEALED BEFORE THE TIME FOR APPLICATION.

General Acts of 1918, Chapter 219:

On or before the fifteenth day of November in the year nineteen hundred and nineteen the treasurer and receiver general shall pay to each city or town, and to each fire, water, improvement, light and watch district having the power of taxation, an amount equal to the difference between the average amount of the tax levied upon personal property in such city, town or district in the years nineteen hundred and fifteen and nineteen hundred and sixteen and the average amount, computed by the tax commissioner, of the tax upon the personal property actually assessed in such city, town

or district for the years nineteen hundred and seventeen and nineteen hundred and eighteen. If the amount of taxes collected from incomes shall exceed the sum necessary to make the said payments, the balance shall be distributed among the several cities and towns in proportion to the amount of the state tax imposed upon each of them in the year nineteen hundred and nineteen: provided, that of the aforesaid excess the commonwealth shall retain a sum sufficient to reimburse it for the expenses incurred under chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen and amendments thereof during the year nineteen hundred and nineteen, and abated taxes repaid thereunder during that year. In years subsequent to nineteen hundred and nineteen, the taxes collected under the provisions of said chapter two hundred and sixty-nine and amendments thereof shall be distributed as the general court may determine.

(5) The permanent provision for distribution enacted in 1919 (the statute the constitutionality of which is assailed in these proceedings).

General Acts of 1919, Chapter 314:

Section 1. The taxes collected by the commonwealth upon incomes under the provisions of chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen, and acts in amendment thereof, shall, on or before the fifteenth day of November in each year, be distributed among and paid to the several cities, towns and districts by the treasurer and receiver general in the manner following, namely,— to each city, town and district such proportion of an amount equal to the difference between the average

amount of the tax levied upon personal property in such city, town or district in the years nineteen hundred and fifteen and nineteen hundred and sixteen, and the average amount, computed by the tax commissioner, that would be produced by a tax upon the personal property actually assessed in each city, town or district for the years nineteen hundred and seventeen and nineteen hundred and eighteen at an average of the same rates of taxation as prevailed therein in the years nineteen hundred and fifteen and nineteen hundred and sixteen, as is ninety per cent thereof for the year nineteen hundred and nineteen, as is eighty per cent thereof for the year nineteen hundred and twenty, as is seventy per cent thereof for the year nineteen hundred and twenty-one, as is sixty per cent thereof for the year nineteen hundred and twenty-two, as is fifty per cent thereof for the year nineteen hundred and twenty-three, as is forty per cent thereof for the year nineteen hundred and twenty-four, as is thirty per cent thereof for the year nineteen hundred and twenty-five, as is twenty per cent thereof for the year nineteen hundred and twenty-six, as is ten per cent thereof for the year nineteen hundred and twenty-seven; and in the year nineteen hundred and twenty-eight and thereafter all the taxes so collected shall be distributed and paid to the several cities and towns in proportion to the amount of the state tax imposed upon each of them in each year.

Section 2. The amount so collected in any year in excess of the sum necessary to make the said payments shall be distributed in proportion to the amount of the state tax imposed upon each city and town in that year: provided, that of the amount so collected the common-

wealth shall first retain a sum sufficient to reimburse it for the expenses incurred in the collection and distribution of said tax and for abated taxes repaid under said act during each year.

Section 3. Chapter two hundred and nineteen of the General Acts of nineteen hundred and eighteen is hereby repealed.

Section 4. This act shall be subject to the provisions of any law enacted by the general court during the year nineteen hundred and nineteen disposing of the proceeds of taxes collected by the commonwealth upon incomes under the provisions of said chapter two hundred and sixty-nine.

Section 5. In respect to their constitutional validity, all the provisions of this act are hereby declared to be inseparable.

(6) The General Property Tax.

Statutes of 1909, Chapter 490, Part I, Section 2:

All property real and personal situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation.

Section 4.

Personal estate for the purpose of taxation shall include:

First, Goods, chattels, money and effects, wherever they are; ships and vessels at home or abroad, except as provided in section seven.

Second, Money at interest, and other debts due the person to be taxed more than he is indebted or pays interest for; but not including in such debts due him

or indebtedness from him any loan on mortgage of real estate, taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate.

Third, Public stocks and securities, except as provided in clause fifteenth of section five, bonds of railroads and street railways, stocks in turnpikes, bridges and moneyed corporations within or without this commonwealth, except as provided in section sixty-four of Part III.

Fourth, The income from an annuity, and the excess above two thousand dollars of the income from a profession, trade or employment accruing to the person to be taxed during the year ending on the first day of May of the year in which the tax is assessed. Incomes derived from property subject to taxation shall not be taxed.

(7) WHERE PROPERTY IS ASSESSED FOR MUNICIPAL TAXATION.

St. 1909, Chapter 490, Part I, Section 15 (*now General Laws, Chapter 59, Section 11*):

Taxes on real estate shall be assessed in the town where it lies . . .

St. 1909, Chapter 490, Part I, Section 18, as amended by St. 1918, Chapter 129 (*now General Laws, Chapter 59, Section 18*):

All taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on April first, except as provided in chapter sixty-three and in the following clauses of this section.

First; All tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five, be taxed to the owner in the town where it is situated on April first. . . .

(8) Apportionment of State Tax.

St. 1909, Chapter 490, Part I, Section 100 (now General Laws, Chapter 58, Section 9):

The tax commissioner shall, before the first day of January in the year nineteen hundred and four and before the first day of January in every third year thereafter, prepare and report in print to the general court, within the first week of its then next succeeding session, an equalization and apportionment upon the several cities and towns, of the number of polls, the amount of property, and the proportion of every one thousand dollars of state or county tax, including polls at one tenth of a mill each, which should be assessed upon each city and town.

(9) Determination of Local Tax Rate.

St. 1909, Chapter 490, Part I, Section 37 (now General Laws, Chapter 59, Section 23):

The assessors shall annually assess taxes to an amount not less than the aggregate of all amounts appropriated, granted or lawfully expended by their respective towns since the last preceding annual assessment and not provided for therein, of all amounts required by law to be raised by taxation by said towns during said year, of all amounts necessary to satisfy final judgments against said towns and of all abatements granted on account of the tax assessment of

any year in excess of the overlay of that year, and not otherwise provided for; but such assessments shall not include liabilities for the payment of which towns have lawfully voted to contract debts. The assessors may deduct the amount of all the estimated receipts of their respective towns, except from loans or taxes, lawfully applicable to the payment of the expenditures of the year from the amount required to be assessed; but such deduction shall not exceed the amount of such receipts during the preceding year.

St. 1916, Chapter 269, Section 24 (now General Laws, Chapter 58, Section 19):

Annually on or before August first the commissioner shall, upon the basis of the information then in his possession, notify the assessors of each town of the amount such town is to receive in any distribution of the tax upon incomes. Said assessors, in determining the rate of taxation to be levied upon taxable property for the year, shall include in the estimated receipts lawfully applicable to the payment of expenditures the aforesaid amount.

(10) Distribution of Corporation Taxes.

General Acts of 1919, Chapter 355, Sections 13, 31 (now General Laws, Chapter 58, Section 20):

One sixth of every tax paid by any domestic business or foreign corporation under sections thirty to fifty-one inclusive, of chapter sixty-three, shall be retained by the commonwealth. The remainder shall be distributed, credited and paid to the town of the commonwealth where the business of the corporation is carried on . . .

Argument.

I.

The Act of 1919 is unconstitutional in providing for the distribution of the income tax upon a rule of apportionment not based on the situs of the property upon which the tax was assessed.

The question at issue is in brief as follows: Has the legislature of a state power to raise money by a tax on property imposed generally throughout the state, and distribute the money so raised to the various cities and towns of the state in accordance with a rule of apportionment not based on the situs of the property upon which the tax was levied?

The very raising of such a question strikes at the root of legislative power over taxation. It has always been recognized as one of the fundamental principles of taxation that a tax can be levied only for the use of the district taxed. The word "district" is used in a broad sense, so as to include any body politic having the power to levy taxes. The United States can levy taxes throughout the United States for federal purposes, a state can levy taxes throughout the state for state purposes, a county can levy taxes throughout the county for county purposes, a city or town can levy taxes throughout such city or town for municipal purposes, and a water, fire, or other subordinate district can levy taxes throughout the district for district purposes. Money raised by a tax levied generally throughout a district may be expended wholly in a portion of the district, provided it is expended for purposes which enure in some conceivable degree to the benefit of the district as a

whole. So, also, a state or county may raise money by taxation and distribute it among its constitutent municipalities, returning to each municipality the amount derived therefrom after deducting the cost of collection, for in such case the officers of the larger unit are merely acting on behalf of the smaller ones. But can money be constitutionally raised by a tax levied generally throughout the state and distributed to the various cities and towns of the state in accordance with a rule of apportionment which disregards the source from which the money was derived? Can a taxpayer by such a means be compelled to contribute to the cost of purely local improvements in cities and towns in which he neither lives nor owns property, and from which he can derive no possible benefit?

It is the purpose of this portion of the brief of the plaintiff in error to demonstrate that this cannot constitutionally be done, and further to make it clear—

(1) That the levy of a tax upon a taxing district of whatever character which is not for the use of the district taxed is a violation of the constitutional rights of the taxpayers of the district so taxed.

(2) That the distribution of the proceeds of the Massachussets income tax among the cities and towns of the state in any other manner than the return to each city and town of the portion of the tax collected from property located or incomes received within such city or town is in effect the levy of a tax which is not for the use of the district taxed, and is thus unconstitutional.

(1) *No tax can be constitutionally levied except for the use of the district taxed.*

It is a well-established principle of constitutional law, not merely that a tax cannot be levied except for the public use, but also that, even if the use be public, no tax can be levied except for the use of the district taxed. It would not be competent for the legislature of a state to levy a tax on the property located in one city for a public improvement established for the use of the people of another city, to require one city or town to pay the entire cost of a public improvement established for the use of the whole state, or to levy a tax upon the whole state for a public improvement established for the use and benefit of a single city or town.

This principle is not based upon the vague and shadowy theory that municipalities have a right to be free from legislative interference with their local affairs, recognized in some jurisdictions but denied in others, but upon the universally recognized and clearly defined constitutional rights of the taxpayers themselves.

The principle involved is recognized by all the text-writers, and has been enunciated by the courts of almost every state. Thus it is said in Cooley on Taxation (3d ed.), p. 225 *et seq.*:

> "In order to give validity to any demand made by the state upon its people under the name of a tax, it is essential that the purpose to be accomplished thereby shall be public in its nature. But it is equally essential . . . that the purpose shall be one which in an especial and peculiar manner

pertains to the district within which it is proposed that the contribution shall be collected, and which concerns the people of that district more particularly than it does others. . . . If . . . for the purpose of purchasing and ornamenting a city park or any other improvement of mere local convenience, a tax should be imposed upon the whole state, it would be equally manifest that equality and justice were not the purpose of the imposition, but that, if carried into effect, the people of the state not residing in the city would be compelled to contribute to a purpose in which, in a legal sense, they had no interest whatever. . . . It can therefore be stated with emphasis that the burden of a tax must be made to rest upon the state at large, or upon any particular district of the state, according as the purpose for which it is levied is of general concern to the whole state, or, on the other hand, pertains only to the particular district. A state purpose must be accomplished by state taxation, a county purpose by county taxation, or a public purpose for any inferior district by taxation of such district."

So, also, it is said in Gray, Limitations of the Taxing Power, sec. 408:

"In the clearer cases controversy seldom arises, for legislatures rarely or never impose a tax on the members of one community which is plainly and absolutely for the sole benefit of another. A city is never taxed to pay the cost of a city hall in another city with which it has no

connection. A school district is never taxed solely to pay for a schoolhouse in a distant territory."

See also Desty, Taxation, secs. 9, 10.

In *Cole* v. *La Grange*, 113 U.S. 1, the court said, at page 8:

> "the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes."

In *Thomas* v. *Gay*, 169 U.S. 264, the court said, at page 276:

> "Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure."

In *Beach* v. *Bradstreet*, 85 Conn. 344, the court said, at page 357:

> "The purposes of taxation must be kept within the range of subjects which bring to the State a direct benefit. The taxation of Connecticut people for some internal improvement in Kansas would universally be recognized as outside the scope of legitimate legislative power."

In *Farris* v. *Vannier*, 6 Dak. 186, the court said, at page 192:

> "It is the essence of taxation that it should compel the discharge of a burden by those upon whom it rests. An attempt to compel one county or municipality to pay a charge properly resting upon the inhabitants of another separate and distinct district or community would be an arbitrary and unauthorized exercise of power. It would be taking private property for private uses, and in no proper sense could it be regarded as taxation, but rather in the nature of confiscation."

In *State* v. *Lafayette Fire Insurance Co.*, 134 La. 78, it was held that a tax could not be imposed upon the state at large to defray the expenses of an officer the benefit of whose services was confined to a particular municipality, the court saying (at page 83):

> "The principle involved is the one, fundamental in the law of taxation, that the purpose of a tax must pertain to the district taxed, or that one part of the state cannot be taxed for the benefit of another."

In *Sharpless* v. *Philadelphia*, 21 Pa. St. 147, the court said:

> "An act of the legislature authorizing contributions to be levied . . . for a purpose which though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another."

In *Robinson* v. *Norfolk*, 108 Va. 14, the court said, at page 16:

> "The principle that one territory cannot be taxed for the benefit of another is fundamental, and well recognized by the authorities on the subject. It does not rest alone upon the theory of taxation without representation, but upon the principle that private property cannot be taken for anything but a public use."

In *Chicago &c. Ry. Co.* v. *State*, 128 Wis. 553, the court said, at page 661:

> "The constitution does not permit of any wholly arbitrary, capricious location of property for taxation. The burden of effecting a strictly state purpose cannot be imposed on a particular locality or localities, nor the burden of those things which are purely local be imposed on persons or property wholly beyond the boundaries of the municipality concerned . . . We indorse to the fullest extent the doctrine so forcibly stated by Judge Cooley . . ."

Similar quotations might be extended indefinitely. Among the decisions in which the same principle has been laid down are included the following:

Ex parte Marshall, 64 Ala. 266.
Hutchinson v. *Ozark Land Co.*, 57 Ark. 554.
People v. *Parks*, 58 Cal. 624.
Escambia County Commissioners v. *Pilot Commissioners*, 52 Fla. 197.

Lexington v. *McQuillan's Heirs*, 9 Dana (Ky.), 513.
Campbell County v. *Newport*, 174 Ky. 712.
Ryerson v. *Utley*, 16 Mich. 266, at page 276.
Attorney General v. *Bay County Supervisors*, 34 Mich. 46.
Sanborn v. *Rice County Commissioners*, 9 Minn. 270, at page 278.
Steiner v. *Sullivan*, 74 Minn. 498, at page 501.
Wells v. *Weston*, 22 Mo. 384.
State v. *Leffingwell*, 54 Mo. 458.
High School District v. *Lancaster County*, 60 Neb. 147.
People v. *Brooklyn*, 4 N.Y. 419.
Keith v. *Lockhart*, 171 N.C. 451.
Manning v. *Devil's Lake*, 13 N.D. 47.
Wasson v. *Wayne County Commissioners*, 49 Ohio St. 622.
Grim v. *Weissenberg*, 57 Pa. St. 433.
Commonwealth v. *Alden Coal Co.*, 251 Pa. St. 134.
Bromley v. *Reynolds*, 2 Utah, 525.
State v. *Davidson*, 114 Wis. 563.

The principle involved is fundamental, and underlies all government that is based upon reason rather than upon force. The distinction between the levy of a tax under a republican form of government, which is merely the division by the people among themselves of the expenses of administering their own public affairs, and the imposition of a contribution or indemnity by superior force for the benefit of another

community needs no elaboration. Taxation for the use of another district is undoubtedly, like taxation for a private use, a violation of the Fourteenth Amendment, in that it is such a gross invasion of fundamental rights as to constitute a deprivation of property without due process of law.

> *Loan Association* v. *Topeka*, 20 Wall. 655.
> *Cole* v. *La Grange*, 113 U.S. 1.

The existence of the principle has indeed not been denied by the Supreme Judicial Court of Massachusetts.

Thus in *Norwich* v. *Hampshire County Commissioners*, 13 Pick. 60, in an opinion by Chief Justice Shaw, it was strongly intimated that the inhabitants of Suffolk County could not be taxed for the whole cost of a bridge in Berkshire County.

In *Duffy* v. *Treasurer & Receiver General*, 234 Mass. 42, the first case involving the constitutionality of the statute now in controversy, the court conceded (at page 51) that—

> "It is a general principle of the law of taxation that the people of one district cannot be taxed for the benefit of another district."

In *Opinion of the Justices*, 234 Mass. 612, the court said (at page 620):

> "Doubtless there may be instances where the imposition of a general tax upon a particular political subdivision would transcend the constitutional power of the Legislature. These may arise from attempts to levy taxes for other than

public purposes or from efforts to make one community pay for a public enterprise not rationally susceptible of conferring any benefit upon it, and perhaps from other causes. It may be presumed that an attempt to make Brookline or Orleans pay for the Springfield bridge would be an abuse of legislative power."

It may therefore be taken that the basic principle upon which the petitioner's argument rests is established beyond controversy, namely, that no tax can be constitutionally levied which is not for the use of the district taxed.

(2) *The Massachusetts income tax is a tax on property having its location in the various cities and towns of the Commonwealth.*

(a) *The Massachusetts income tax is, at least as to its most important part, a property tax, and not an excise.*

It may be of some importance to point out that the tax in question is, at least as to its most important part, a tax on property, and not an excise, since, although an excise must relate to a subject-matter which has a situs in the district in which the tax is levied, the situs of an excise is more elastic than that of a property tax.

It is, however, well settled that the tax upon the income of intangible personal property imposed by section 2 of the Income Tax Act is a property tax, and not an excise.

It was said by the court in *Opinion of the Justices*, 220 Mass. 613, at page 623:

"A tax upon income from money on deposit

> or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. . . . It follows that a tax upon such income is a property and not an excise tax."

It is true that the principle laid down in 1915 in the *Opinion of the Justices*, 220 Mass. 613, that an income tax could not be levied upon certain classes of intangible property unless all property was taxed in the same way, was nullified in the same year by the adoption of the Forty-fourth Amendment to the Constitution of Massachusetts, which authorized the levy of a tax upon the income of certain classes of property only, but the amendment did not change the character of such a tax. It has been unequivocally held that the tax upon the income of intangible property imposed under the authority of the Forty-fourth Amendment by section 2 of the Income Tax Act of 1916 is a property tax.

> *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531.

Kimball v. *Cotting*, 229 Mass. 541, 543.
Maguire v. *Tax Commissioner*, 230 Mass. 503, 512.

This view of the character of a tax levied on the income of certain specified classes of property as distinguished from a tax on the income from professions, trades, employments, or business, or from a tax on income of every description, is undoubtedly in accord with the views expressed by the Supreme Court of the United States.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601.
Brushaber v. *Union Pacific R.R. Co.*, 240 U.S. 1.
Stanton v. *Baltic Mining Co.*, 240 U.S. 103.

Whether the tax imposed by section 5 of the act upon income derived from professions, employments, trade, or business is an excise or a property tax is perhaps open to doubt, although the tax which it replaces, and which had been imposed continuously since the first settlement of the colony, appears to have been considered a property tax. See *Opinion of the Justices*, 220 Mass. 613, at pages 624 and 625. But in any event the more important tax, the tax on the income of intangible property, is a property tax.

(*b*) *All of the property subject to the income tax has a definite situs in some city or town within the Commonwealth.*

The principles of the law of situs which govern the taxation of property are applicable to the taxation of income. If an income is to be taxed by a state, the

person in receipt of the income must have a domicil within the state, or the property or business out of which the income arises must be situated within the state, so that the income may be said to have a situs therein.

State v. *Wisconsin Tax Commission*, 161 Wis. 111.

See also—

United States Glue Co. v. *Oak Creek*, 247 U.S. 321.
Shaffer v. *Carter*, 252 U.S. 37.
Travis v. *Yale & Towne Mfg. Co.*, 252 U.S. 60.
State v. *Eberhardt*, 158 Wis. 20.

While, as between different municipalities in the same state, it is competent for the legislature to modify the common-law rules of situs, and to give to particular classes of property any situs it deems best, this principle is subject to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast, either directly or by reference to the property taxed, from which there can reasonably be seen reciprocal duties to accord benefits on the one hand, and to respond therefor on the other.

Teagan Transportation Co. v. *Detroit*, 139 Mich. 1.
Chicago &c. Ry. Co. v. *State*, 128 Wis. 553, at page 665.

In most cases arising under the Massachusetts In-

come Tax Act, the only ground upon which Massachusetts could have constitutionally taxed the income at all is that the person receiving the income has his domicil in Massachusetts. The income which is taxed by section 2 of the Income Tax Act consists primarily of dividends from stock in foreign corporations and interest from bonds, notes, money at interest, and debts due the person to be taxed, and a very substantial part of this income is constitutionally taxable in Massachusetts solely because the person receiving the income lives there.

Thus in the case of shares of stock in a foreign corporation not carrying on business in Massachusetts, owned by a resident of Massachusetts, although the state of incorporation may tax the capital stock of the company, and the state in which its property is situated may reach the shares indirectly by a tax on the property, the only ground upon which Massachusetts can claim the right to tax the shares is that they have a situs at the domicil of the owner; and, if this property has a situs in any town in Massachusetts, it must be the town of the domicil of the owner, for no other city or town in the Commonwealth has a shadow of a claim to it.

Sturges v. *Carter*, 114 U.S. 511.
Darnell v. *Indiana*, 226 U.S. 390.
Hawley v. *Malden*, 232 U.S. 1, 12, sustaining 204 Mass. 138.
Great Barrington v. *Berkshire County Commissioners*, 16 Pick. 572.
Dwight v. *Mayor & Aldermen of Boston*, 12 Allen, 316.

Bellows Falls Power Co. v. *Commonwealth*, 222 Mass. 51.
Welch v. *Treasurer & Receiver General*, 223 Mass. 87.

In the case of bonds, notes, and other debts the case is even stronger, for, in the absence of special circumstances creating a business situs elsewhere, the only situs of such property is at the domicil of the creditor.

State Tax on Foreign Held Bonds, 15 Wall. 300.
Kirtland v. *Hotchkiss*, 100 U.S. 491.

So, also, in the case of bank deposits, the primary situs of such property is at the depositor's domicil.

Fidelity &c. Trust Co. v. *Louisville*, 245 U.S. 54.

With respect to the tax on the income from professions, employments, trade, or business, as already stated, there may be some doubt whether this tax is a tax on property or an excise, and it may be more difficult to determine situs for the purpose of levying excises than in the case of property taxes.

Elastic as the situs of an excise may be, it cannot be stretched so as to bring about the conclusion that the situs of an occupation carried on in Brookline by a resident of Brookline is in any city or town in Massachusetts other than Brookline.

It seems, therefore, clear that all of the income subject to taxation by the Massachusetts Income Tax Act must necessarily have a situs in some city or town in that state.

(3) *The Massachusetts income tax is a tax which is not levied for the use of the district taxed.*

It is contended by the defendant in error that, since the proceeds of the income tax can be expended only for the public use, it is immaterial whether the expenditure is made by the state or by the several cities and towns, for the state is the district taxed, and in either case the tax is levied and the expenditure made for the use of such district. This contention is, however, unsound.

While municipal corporations, in Massachusetts as elsewhere, are not permitted to levy taxes or to expend money except for the public use, the distinction between expenditures which a municipal corporation undertakes as an agent of the state for the accomplishment of general public purposes and those which it undertakes in its private and proprietary capacity with special reference to the benefit of its own inhabitants is as fully recognized in Massachusetts as in any other state.

Thus it was said by the Supreme Judicial Court of Massachusetts in *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 519, in holding that in maintaining a cemetery the city of Boston was acting in its private or proprietary capacity:

> "The city of Boston is possessed of much other property which in a certain sense and to a certain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water works, its system of parks, its market, its hospital, and its library. In

establishing all of these, the city has not acted strictly as an agent of the State government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants."

See also—

Higginson v. *Treasurer & School House Commissioners of Boston,* 212 Mass. 583.
Pearl v. *Revere,* 219 Mass. 604.
Woods v. *Woburn,* 220 Mass. 416, 421.

In *Bolster* v. *Lawrence,* 225 Mass. 387, Chief Justice Rugg summarized the decisions in which it had been held that a municipal corporation was liable for negligence in connection with functions undertaken for its own profit, in the following language:

"On the other hand a municipality is answerable for the acts of its servants or agents in the conduct of functions voluntarily undertaken for its own profit and commercial in character, or to protect its corporate interests in its own way. Thus it is liable for the acts of agents specially selected and deputed to repair highways to the exclusion of those public officers provided by the law, on the ground that it is protecting by *quasi* private instrumentalities its pecuniary interest growing out of statutory liability for defects in highways. *Butman* v. *Newton,* 179 Mass. 1. *Waldron* v. *Haverhill,* 143 Mass. 582. It is liable, on the same ground, for agencies used in lighting streets. *Dickinson* v. *Boston,* 188 Mass. 595. *Sullivan* v. *Holyoke,* 135 Mass. 273. So, also, it is liable for

negligence in the management of its water department, *Hand* v. *Brookline*, 126 Mass. 324, *Lynch* v. *Springfield*, 174 Mass. 430, *Johnson* v. *Worcester*, 172 Mass. 122, in the operation of its sewer system, *O'Brien* v. *Worcester*, 172 Mass. 348, *Allen* v. *Boston*, 159 Mass. 324, in running a ferryboat, *Davies* v. *Boston*, 190 Mass. 194, in the letting of a public hall for profit, *Little* v. *Holyoke*, 177 Mass. 114, *Oliver* v. *Worcester*, 102 Mass. 489, 499, in managing a farm, partly for the support of its poor, partly for the maintenance of its highway department, and partly for the production of income, *Neff* v. *Wellesley*, 148 Mass. 487, in the operation of a stone crusher for profit, *Duggan* v. *Peabody*, 187 Mass. 349, *Collins* v. *Greenfield*, 172 Mass. 78, and in the maintenance of electric and gas lighting plants for the use of which rates are charged."

This principle is by no means peculiar to Massachusetts. The distinction between expenditures undertaken by a municipal corporation in its private and proprietary capacity for the use and benefit of its own inhabitants and those carried on in its public and governmental capacity for the use and benefit of the public at large has frequently been recognized by the Supreme Court of the United States.

Tippecanoe County Commissioners v. *Lucas*, 93 U.S. 108, 115.

Meriwether v. *Garrett*, 102 U.S. 472, 518, 530.

Mobile v. *Watson*, 116 U.S. 289, 305.

Essex Board v. *Skinkle*, 140 U.S. 334, 342.

New Orleans v. *Water Works Co.*, 142 U.S. 79, 91.
Covington v. *Kentucky*, 173 U.S. 231, 240.
Worcester v. *Worcester St. Ry. Co.*, 196 U.S. 539, 551.
Monterey v. *Jacks*, 203 U.S. 360.
Hunter v. *Pittsburgh*, 207 U.S. 161, 179.
Los Angeles v. *Los Angeles Gas Corporation*, 251 U.S. 32.

The General Laws of Massachusetts authorize cities and towns to expend money for many functions which are universally recognized as undertaken by them in their private and proprietary capacity for the use and benefit of their own inhabitants, and not for the use and benefit of the public as a whole.

Thus a city or town is authorized by General Laws, c. 40, sec. 5, to appropriate money to pay premiums on surety bonds of municipal officers; to establish parks; for printing town records and histories; to establish and maintain burial grounds; to employ counsel to represent its interests before a committee of the legislature; to prosecute proceedings in all matters relative to the fixing of rates by public-service companies; for the establishment and maintenance of libraries, hospitals, and gymnasiums; for constructing telegraph lines for the use of the town; for band concerts; and for celebrating old home week.

Cities and towns are authorized by General Laws, c. 40, sec. 10, to appropriate money to provide and maintain markets; by section 10, to establish bathhouses and wash-houses; by section 19, to provide food at reasonable rates to their inhabitants in time of war; by section 38, to provide a water supply for their in-

habitants; by chapter 161, sec. 143, to operate street railways for passengers or freight; and by chapter 164, sec. 34, to construct and maintain gas or electric lighting plants for municipal use or for the use of their inhabitants.

A city or town may expend money paid over to it under the statute now in controversy for any of the foregoing purposes, although the greater part of the money may have been raised by the taxation of property situated in other cities and towns; and, conversely, a large proportion of the taxes raised upon intangible property located in one city or town may be expended for the private and proprietary purposes of inhabitants of other cities and towns. Thus over a million dollars of the money raised by taxation on property and incomes in Brookline is turned over to other cities and towns, such as Worcester, which receives two hundred thirty-seven thousand dollars ($237,000) more each year than its inhabitants contribute, and Springfield, which receives two hundred twenty-five thousand dollars ($225,000) more than its inhabitants contribute, and this money may under the statutes be used for lighting plants, municipal street railways, and other like purposes for the sole use and benefit of the inhabitants of Worcester or Springfield as the case may be and of no benefit to Brookline or to the state at large.

If the petitioner, living and owning property located in Brookline, is taxed on such property and a large part of the money so raised is not returned to Brookline, to be used for municipal purposes, or appropriated by the legislature for the support of the Commonwealth and the protection and preservation

of the inhabitants thereof, but is turned over to other cities and towns to be used if they see fit for their own private and proprietary purposes, it would seem to require no further argument to show that he is being deprived of his constitutional rights.

(4) *The Massachusetts income tax is a municipal, and not a state, tax.*

If it had been expressly provided by statute that the city of Springfield might establish a municipal lighting plant to furnish electric light to its inhabitants at lower rates than could be obtained from a private enterprise, and that the town of Brookline should be assessed for the cost of the undertaking the sum of two hundred twenty-five thousand dollars ($225,000), no one would deny that the statute was unconstitutional as a plain abuse of legislative power.

Tippecanoe County Commissioners v. *Lucas*, 93 U.S. 108, 115.
Opinion of the Justices, 234 Mass. 612.

It is, however, contended by the defendant in error that such a result can be constitutionally effected by the device of interposing a set of state officials to collect and distribute the tax; that the tax is a state, and not a municipal, tax, and that the legislature in distributing the proceeds of the tax to the various cities and towns of the state is merely appropriating for public purposes funds raised by taxation throughout the state. The Supreme Judicial Court of Massachusetts accepted this contention, the court saying:

"The income tax thus is a State tax. The sev-

> eral municipalities have been abolished as taxing districts so far as concerns intangible personal property . . . The Commonwealth has been made a single taxing district . . . It is a general principle of the law of taxation that the people of one district cannot be taxed for the benefit of another district. . . . That principle is not violated by the statute here in question, because the State is the taxing district."
>
> *Duffy* v. *Treasurer & Receiver General*, 234 Mass. 42, 47, 48, 51.

This statement is, however, entirely unwarranted. While the several municipalities have been abolished so far as the assessment and collection of the tax is concerned, the tax is none the less a municipal tax. It is admittedly levied wholly for the use of the several municipalities, and in no degree for the use of the state, and the officers of the state in assessing, collecting, and distributing the tax are acting merely as agents of the several cities and towns for whose use the tax is levied.

This view of the nature of the tax is corroborated by the practical construction put upon it by both administrative and legislative branches of the state government. Thus it appears that the income tax was not paid into the general fund of the state treasury, but was kept separate as an "agency account."

The general fund of the state treasury is established by St. 1917, c. 277, sec. 1, which provides as follows:

> "All revenue payable into the treasury of the commonwealth and available for meeting any costs

or expenses of state departments, boards, commissions, institutions, or undertakings, or for meeting any other cost or expense of the state government, shall be paid into the general fund or ordinary revenue'' (with certain exceptions not now material).

It is alleged in the petition and admitted that the income tax ''is not paid into the general fund of the Commonwealth, but is kept separate and is designated an 'Agency Account' '' (Petition, par. 11) (Rec. pp. 6, 7).

This fact indicates a practical construction of the income-tax laws by the highest fiscal officers of the state, elected by and accountable only to the people of the state, that the income tax is not used for ''meeting any costs or expenses of state . . . undertakings or for meeting any other cost or expense of the state government''; or, in other words, the state, through its constituted officials, has construed the act as the petitioner contends that it should be construed, namely, as a tax for municipal and not for state purposes.

The practical construction put upon a law by those charged with its enforcement is a circumstance entitled to considerable weight.

Brown v. *United States*, 113 U.S. 568, 571.

Bates & Guild Co. v. *Payne*, 194 U.S. 106, 111.

United States v. *Hermanos y Compañia*, 209 U.S. 337.

Burrage v. *Bristol*, 210 Mass. 299.

Tyler v. *Treasurer & Receiver General*, 226 Mass. 306, 310.

The same construction was put upon the income tax by the Governor and by the legislature itself by not including the tax or its distribution in the state budget.

The 63d Amendment to the Constitution of Massachusetts provides that within three weeks after the convening of the General Court (legislature) the Governor shall recommend to the General Court a budget which shall contain a statement of all proposed expenditures of the Commonwealth for the fiscal year, including those already authorized by law, and of all taxes, revenues, loans, and other means by which such expenditures shall be defrayed; and that all appropriations based upon the budget to be paid from taxes or revenues shall be incorporated in a single bill, called the "general appropriation bill"; and that special appropriation bills may be enacted subsequent to the enactment of the general appropriation bill which shall provide the specific means for defraying the appropriations therein contained. It is alleged in the petition and admitted by demurrer—

> "That the distribution of the proceeds of the income tax as authorized by said Chapter 314 of the General Acts of 1919 was not contained in the original budget or in any supplementary budget submitted by the governor in the year 1920, nor was it included in any general or special appropriation bill enacted by the general court during said year" (Petition, par. 14) (Rec. pp. 8, 9).

The budget amendment was evidently intended, among other things, to prevent any such confusion in the fiscal affairs of the state as would be caused by appropriations for state purposes by virtue of continuing

provisions of law and to provide that all revenues and all appropriations shall be marshalled together each year, so that a balance may be struck and the Governor, the legislature, and the people may know at a glance the total amount of appropriations required for current expenses each year and the revenues available to meet them, and that a statute appropriating funds from the state treasury for the different state departments over a long period of years would be in conflict with the fiscal system established by the budget amendment, and that, after the first year, it would be necessary to include such appropriations in the Governor's budget and the general appropriation bill for each year, and that the earlier statute, so far as it attempted to prescribe the appropriations of subsequent years, would be nugatory. It is equally apparent that such a provision as is contained in St. 1919, c. 314, requiring payments from the state to the several cities and towns over an indefinite period of years, if it constitutes an appropriation of state funds for state purposes, authorized "expenditures of the commonwealth" within the meaning of the 63d Amendment, and is in conflict with the fiscal system established by that amendment. From the fact that in the year 1920 the Governor did not include the distribution of the income tax in his budget and the legislature did not include it in any general or special appropriation bill, the conclusion is irresistible that the Governor, and the legislature itself, have construed St. 1919, c. 314, not as constituting an appropriation by the Commonwealth for state purposes, of funds in its treasury raised by a state tax, but as providing for the distribution by the state treasurer of money which he has in his hands as agent of the

several cities and towns by virtue of a tax levied for municipal purposes.

The petitioner, however, believes that all the discussion whether the tax is a state tax or a municipal tax is beside the point, a controversy over form and not substance. The facts are plain enough; by virtue of the statutes of the state, property in one city or town is taxed for the private and proprietary uses of another city or town, and whether the device used for bringing about this result is called a state tax or not can make little difference. The petitioner's position is in substance this: So far as the Constitution of the United States is concerned, the legislature of a state may abolish all the cities, towns and other municipal subdivisions of the state and provide for the administration of the affairs of the whole state by state officers and by means of appropriations made directly by the legislature from taxes levied throughout the state as a whole. But so long as the legislature sees fit to allow municipal corporations to exist, and to exercise powers of a private and commercial character for the use and benefit of their own citizens and not for the use and benefit of the state as a whole, and to appropriate funds for the exercise of such powers through their own municipal legislative bodies, it is not competent for the legislature, directly or indirectly, through any means, device, or instrumentality whatever, to provide for the taxation of persons or property remote from the municipal limits for the use of such a municipal corporation.

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(5) *The method of distribution adopted in the 1919 statute is not in accord with the established practices of constitutional governments.*

It is well settled that in determining what constitutes due process of law the court will be governed to a considerable extent by the established practices of constitutional governments.

> *Murray's Lessee* v. *Hoboken Land &c. Co.*, 18 How. 272.

It is believed that the 1919 statute now in controversy is entirely without precedent in the history of constitutional government. The distinction between a statute allotting money raised by state-wide taxation to different sub-divisions of the state, to be used by them for specified purposes of benefit to the state as a whole, or to reimburse them for expenditures they have made for the benefit of the state, and a statute such as the present, which distributes money among the different municipalities without any relation to the expenditures made by them for the public good, is an obvious one. The distinction between the so-called Smith-Hughes Act, providing for the reimbursement of states by the United States for money spent by them on vocational education, and the Rural Post Road Act of June 11, 1916, providing for the contribution by the United States to the cost of constructing rural post roads by the states, on the one hand, the constitutionality of which has never been assailed, and an Act of Congress providing for the assessment of a tax on the income of intangible personal property at a uniform rate throughout the United States and the distribution

of the proceeds among the states in proportion to the value of their real estate and tangible personal property, to be used by the respective states for any purpose which they saw fit, which, we trust, no one would contend to be constitutional, illustrates the difference between what has been done in the past and the principle adopted in the Massachusetts act.

The Supreme Judicial Court of Massachusetts expressly admits that—

> "The present statute is a departure in important particulars from any tax law which has hitherto been enacted in this Commonwealth."
>
> 234 Mass. 53.

This is undoubtedly true, for all previous statutes which authorized the levy of a state-wide tax for municipal purposes made careful provision for the distribution of the proceeds to the cities and towns in which the property taxed was situated.

A reasonably careful study of the statutes and decisions of other jurisdictions discloses no instances in which a property tax has been collected by a state or county and distributed to the constitutuent towns, in which the distribution has not been made strictly in accordance with the source from which the tax was derived.

In most of the state statutes authorizing the levy of an income tax, the proceeds of the tax are expended directly by the state for state purposes. See, for example, Delaware, St. 1917, c. 8, 26; New Mexico, St. 1919, c. 123, sec. 10; North Dakota, St. 1919, c. 224, sec. 28; Oklahoma, Bunn's Supp. to Rev. Laws (1915), sec.

7537, A to M; Virginia, Act of April 16, 1903, sec. 10; Act of March 14, 1918.

Under the Alabama Income Tax Act, St. 1919, c. 328, sec. 345, it is provided, with respect to income taxes other than on corporations doing business in more than one county, as follows:

> "All other income taxes shall be regarded as arising at the place of residence, if an individual, or at the principal place of business, if a corporation. The State Auditor shall within thirty days after the receipt of payment of any income taxes pay over to the county treasurer. . . . for the county in which such tax is regarded as arising 25% of such taxes; to the treasurer of the municipal corporation in which such taxes are regarded as arising 35% of the tax there arising, and to the treasurer of the State of Alabama the balance left after such payment."

Under the Wisconsin Income Tax Act, General Laws of 191', c. 48*a*, sec. 23, it is provided as follows:

> "The revenue derived from such income tax shall be divided as follows, to wit:—Ten per cent to the state, 20% to the county, and 70% to the town, city or village in which the tax was assessed, levied and collected, which shall be remitted and accounted for in the same manner as the state and county taxes collected from property are remitted and paid."

See also *State* v. *Carney*, 158 Wis. 20.

In the states which have adopted the "Three Mill Tax," or a tax at a fixed rate on intangible property,

such as Pennsylvania and Maryland, the tax is either collected and retained by the counties or municipalities, or, if collected by the state, is returned to the municipalities from which it was collected.

Thus in Minnesota, where there is a three-mill tax on money and credits, the proceeds are distributed one sixth to the state, and one sixth to the county, one third to the school district, and one third to the municipality in which the property is assessed.

In Iowa, where there is a five-mill tax on intangible property, the tax is assessed and collected where the owner resides.

In Pennsylvania, where there is a four-mill tax, three fourths of the proceeds of the tax are returned to the counties in which the owners of the property reside.

The only apparent exception to the otherwise universal practice of returning the proceeds of the tax to the source is found in the Income Tax Act recently adopted in New York, which provides that one half of the tax shall be retained in the state treasury and one half distributed to the various towns in proportion to the assessed value of their real estate. It should, however, be noted that this is not a tax on the income of particular classes of property, but is a general income tax, and thus is an excise, and not a property tax.

Brushaber v. *Union Pacific Railroad,* 240 U.S. 1, 16, 17.

So, also, in the New York law the income of real estate is taxed; and the law does not present the aggravated injustice of distributing the tax on one class of property in proportion to wealth in other classes, but merely distributes a tax on all income in proportion to

wealth in the class of property in which the greatest amount of wealth is invested.

But finally it must be remembered that the New York act was adopted after the Report of the Recess Committee of Massachusetts had been published, and that the New York legislature consciously followed the method of distribution recommended in that report. Its imitative action can hardly be cited as a precedent in support of the Massachusetts Act.

It is therefore safe to say that, until the present controversy arose, no legislation had ever been enacted, or, so far as appears, suggested, in the United States or in any other country in which government is based upon reason and justice rather than force, looking to the levy of a property tax at a uniform rate throughout an extensive territory, and a distribution of the proceeds of the tax among the municipalities composing such territory upon a rule of apportionment not based on the source from which the tax was derived; or, in other words, until the present time it has never been attempted in any jurisdiction in which the principles of constitutional government are understood and respected to provide directly or indirectly for the taxation of the people of one city or town for the use and benefit of another municipality. It is submitted that such taxation is not due process of law.

II.

THE ACT OF 1919 IS UNCONSTITUTIONAL IN ESTABLISHING A PURELY ARBITRARY DISCRIMINATION BETWEEN TAXPAYERS OF DIFFERENT TOWNS.

Assuming for purposes of argument that the petitioner's contentions in the previous portions of the

brief are unsound and that the legislature of a state may constitutionally provide for the taxation of property in one city or town for the use and benefit of another city or town provided it is done through the medium of an assessment by a state-wide tax, and a distribution of the proceeds through some general rule of apportionment, still even then it must be admitted that the rule of apportionment to be constitutional must rest upon some conceivably rational foundation. While the income tax is imposed at a uniform rate throughout the state and the taxpayer pays no more and no less toward the income tax, however it is distributed, not only does he have a direct interest in having his city or town receive a fair share of the proceeds of the tax and thus be able to furnish him with good schools, roads, sewers, water supply, and other municipal improvements necessary for comfortable living, but under the laws of the state the tax which he pays on his real estate and tangible personal property is directly affected in inverse proportion by the amount of income tax which his town receives. General Laws, c. 58, sec. 19; c. 59, sec. 23. If there is an arbitrary discrimination between two towns similarly situated in the amount of income tax distributed to each, there is an arbitrary discrimination between the taxpayers of the two towns with respect to the amount of the taxes which they are obliged to pay on real estate and tangible personal property; and it is well settled that a statute which establishes a purely arbitrary discrimination between two taxpayers similarly situated, not based on any conceivably rational distinction, is unconstitutional, as denying the equal protection of the law.

As was said by the court in *Sunday Lake Iron Co.* v.

Wakefield, 247 U.S. 350, in relating to a tax alleged to be discriminatory:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

See also *Raymond* v. *Chicago Traction Co.*, 207 U.S. 20.

Southern Ry. Co. v. *Greene*, 216 U.S. 400, 417.

Citizens Telephone Co. v. *Fuller*, 229 U.S. 322.

The Massachusetts Supreme Judicial Court in effect concedes this to be the law, saying:

> "It is enough if some general plan be followed which is not discriminatory, arbitrary or fanciful in its operation."

Duffy v. *Treasurer & Receiver General*, 234 Mass. at page 54.

On its face the method of distribution seems clearly discriminatory, arbitrary, and fanciful. As the proceeds of the income tax annually exceed the amount of the state tax by a large amount, the distribution of the income tax is not merely a refunding of the state tax, but a gratuity to the towns which have paid their just share of the state tax granted for no apparent reason.

But the court treats the statute, not as taking the

state tax as itself the measure of distribution, but as adopting the same measure as the state tax, namely, real estate and tangible personal property, and seeks to justify that measure as a reasonable one. Thus in the Duffy case, at page 50, the court says that the distribution—

> "is [made] upon a basis recognized by law and practice as just for the levying of the State tax. It hardly could be contended that the foundation upon which the State tax rests is unconstitutional because irrational, whimsical or arbitrary."

It does not, however, follow that a basis which is just for apportioning a burden is for that reason just in distributing a benefit. The law recognizes that towns, like individuals, should be taxed in proportion to their ability to pay; and a discrimination in favor of one town because its real estate is valuable and against another because its real estate is not valuable seems as obnoxious to the principles of American constitutional law as any that could be devised.

The state court seems to realize this peculiar result of the law, and elsewhere in the opinion the statute is justified on the ground that it—

> "was passed pursuant to a purpose to equalize the burdens of taxation throughout the Commonwealth. . . . Its apparent aim was to apportion the entire burden of taxation so that it would be more nearly equal than hitherto."
>
> *Duffy* v. *Treasurer & Receiver General*, 234 Mass. 42, 53.

In another part of the opinion the court justifies the method of distribution adopted in the statute on the ground that it must be considered as a part of and in relation to the entire scheme of taxation established by the law. 234 Mass. 51. For this reason it is necessary to consider the statutes relating to the assessment and distribution of other forms of taxation. In substance these are as follows:

Real estate and tangible personal property (merchandise, machinery, and animals) are taxed by the city or town in which they are located, the location of tangible personal property being determined as of the 1st day of April in each year. This tax applies to individuals, and to corporations as to their real estate and machinery. General Laws, c. 59, secs. 11, 18.

Corporations are taxed by the state, by an excise tax based partly on income and partly on the aggregate value of their capital stock, with deductions for property locally taxed or not taxable. General Laws, c. 63, secs. 30-52. Of the proceeds of this tax one sixth is retained by the state, and the remainder of the tax is distributed to the cities and towns, the tax on each corporation being paid over to the city or town in which the corporation carries on business. General Laws, c. 58, sec. 20.

The state tax (that is, the balance required to meet the appropriations of the legislature and debt requirements over and above the returns from inheritance taxes and other excises) is apportioned upon the cities and towns in proportion to the value of their real estate and tangible personal property. General Laws, c. 58, sec. 9.

The tax rate on real estate and tangible personal

property in each city or town is determined by adding to the requirements for municipal purposes the share of the city or town in the state tax, and deducting from the sum of these two items the estimated receipts from corporation taxes and income taxes paid over by the state. This process determines the amount to be raised by taxation of real estate and tangible personal property, and the next step is to divide the amount so to be raised by the aggregate value of the real estate and tangible personal property in the city or town. The resulting figure is the tax rate, generally expressed in dollars of tax per thousand dollars of valuation. General Laws, c. 59, sec. 23.

It is obvious that under such a system of taxation, in the absence of any allegations of peculiar local conditions, the distribution of the income tax under the statute now under consideration aggravates rather than equalizes any existing inequalities in the burden of taxation throughout the Commonwealth.

Thus if two towns, A and B, were of the same population and required the same amount of municipal expenditure, namely, two million dollars per annum, and in town A the aggregate value of the real estate and tangible personal property was one hundred million dollars and in town B fifty million dollars, in the absence of any receipts from income taxes the tax rate in town A would be $20 per thousand, and in town B, $40 per thousand. This inequality the resident of town B would have to put up with, as a necessary result of living in the poorer town; but it is no ground for discriminating against him in other ways. But under the statute in controversy, town A would receive just twice as much from the income tax as town B, and the in-

equality between the towns would be aggravated. Thus if town B received $100,000 from the income tax, town A would receive $200,000, and the disproportion in the burden of taxation borne by the taxpayers of the two towns would be correspondingly increased.

There is nothing in local conditions which would give the statute any different result. The local conditions are accurately set forth as follows in paragraph 16 of the petition (Rec. p. 9), the truth of which the Attorney General admits:

> "That there are in the Commonwealth of Massachusetts a number of cities and towns containing large manufacturing establishments and important commercial districts, in which land is very valuable and where large and valuable buildings have been erected; and that the taxes on the real estate and tangible personal property in such cities and towns *furnish ample revenue for such cities and towns;* that there are in the Commonwealth other cities and towns, containing few manufacturing establishments and no important commercial districts, and such towns are *obliged to depend for their revenues upon the taxable intangible property* and incomes of their inhabitants, and that the Town of Brookline falls within the latter class."

It thus appears in this case that over half the taxable property in Brookline is taken away and distributed to other cities and towns, which already have ample revenue from the taxation of real estate and tangible personal property. Such cities and towns also necessarily receive a larger share of the corporation tax

than Brookline by reason of the fact that they contain large manufacturing establishments and important commercial districts which Brookline does not. The statement of the Supreme Judicial Court of Massachusetts that the apparent aim of the distribution act was to apportion the entire burden of taxation so that it would be more nearly equal than hitherto is utterly unwarranted.

There can be no doubt that the aim of the statute was to enable one class of towns to receive and enjoy that which did not belong to them; and that the statute embodies an intentional and arbitrary discrimination in favor of one class of taxpayers against another, and that on that account, if on no other, it is in violation of the Fourteenth Amendment.

Respectfully submitted,

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